

CASE LAW COLLECTIONS ON CIVIL MATTERS

PART-I

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SC & HC JUDGEMENTS

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-SRIDHARA BABU.N

**THIS WORK IS DEDICATED TO
MY PARENTS**



Smt Gowramma

&

Sri H.R. Nagarajachar

MY GURU



THE CONTENTS ARE HARD WORK OF EACH JUDGES OF HINDUSTAN COURTS



**USE IT SPREAD IT AND BRING GREATEST CHANGE IN OUR LEGAL
FIELD.**

**LET YOUR CLIENTS BE AWARE OF LAW, AWARENESS DOES NOT CUT
OUR POCKETS, IT BRINGS ELITE CIVILISATION TO BRING UP NATION
AND SOCIETY**

SRIDHARA BABU.N

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	DOCUMENT AND ITS LEGAL CONSTRUCTION
	INTERPRETATION OF DOCUMENT - WHERE AN ABSOLUTE TITLE IS GIVEN IN CLEAR AND UNAMBIGUOUS TERMS AND THE LATER PROVISIONS TRENCH ON THE SAME, THAT THE LATER-PROVISIONS HAVE TO BE HELD TO BE VOID
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	CONTRACT IS NOT AN EVIDENCE
	SHAM SALE DEED ALLEGATION - CONTENDING TO HAVE NOT ACTED UPON
	ADMISSIBILITY OF UNREGISTERED PARTITION DEED
	DOCUMENT SHOULD BE READ AS A WHOLE FOR ITS INTERPRETATION
	THE BURDEN OF PROOF IS HEAVY ON A PERSON QUESTIONING THE SALE DEED AND CLAIMING THE SAME TO BE NOMINAL
	SOME BRIEF CITATION POINTS ON DOCUMENTS
	A PARTY TO AN INSTRUMENT CANNOT BE A VALID ATTESTING WITNESS TO THE SAID INSTRUMENT
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	PRESUMPTION OF OLD DOCUMENTS UNDER SECTION 90 – DISCRETION OF COURT TO ACCEPT IT SHALL BE EXERCISED WITH REASONS
	WHEN SOURCE OF TITLE IS NOT DISCLOSED – MERE STATEMENT WITHOUT PROOF OF DOCUMENT AS TO SOURCE OF TITLE IS NOT RELEVANT

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	BURDEN OF PROOF WHEN FRAUD MISREPRESENTATION ALLEGED AND PERSON IN DOMINATION OF OTHERS
	BURDEN OF PROOF AND ONUS OF PROOF
	IN A SUIT FOR DISPUTED PROPERTY THE BURDEN TO PROVE TITLE TO THE LAND SQUARELY FALLS ON THE PLAINTIFF
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	WHEN OBJECTION AS TO MARKING OF DOCUMENT RAISED PROPER PROCEDURE TO FOLLOW
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	NEWS PAPER REPORTS AND EVIDENTIARY VALUE
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	PERSON CANNOT SUFFER OWING TO INACTION OF THE COURT
	WRONG PROVISION OF LAW DOES NOT VITIATE ORDER – IF SUCH ORDER IS WITHIN THE POWER OF AUTHORITY
	WHEN IDENTIFICATION OF PROPERTY IS IN DISPUTE NO RELIEF BE GRANTED
	COURTS TO BE REALISTIC IN IMPOSING COSTS
	NEW CREED OF LITIGANTS HAVE CROPPED UP - WHO DO NOT HAVE ANY RESPECT FOR TRUTH - RESORTING TO FALSEHOOD AND UNETHICAL MEANS FOR ACHIEVING THEIR GOALS
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	COURT CANNOT IMPOSE COSTS EXCEEDING ITS LIMITS UNDER CPC AND ALSO IT CANNOT DIRECT THE COSTS TO BE PAID TO LEGAL SERVICES AUTHORITY
	ADJOURNMENT AND COSTS - ACTUAL COST THAT HAD TO BE INCURRED BY THE OTHER PARTY SHALL BE AWARDED WHERE THE ADJOURNMENT

	IS FOUND TO BE AVOIDED
	PROVISION OF COSTS INTEND TO ACHIEVE FOLLOWING GOALS
	WHEN COURT HAS BEEN GIVEN A CERTAIN AMOUNT OF LATITUDE IN THE MATTER OF PROCEDURE, IT SURELY CANNOT FLY AWAY FROM ESTABLISHED LEGAL PRINCIPLES WHILE DECIDING THE CASES BEFORE IT
	IF THE APPLICATION IS FOUND TO BE MISCHIEVOUS, OR FRIVOLOUS, OR TO COVER UP NEGLIGENCE OR LACUNAE, IT SHOULD BE REJECTED WITH HEAVY COSTS
	PROCEDURAL DEFECTS WHICH DO NOT GO TO THE ROOT OF THE MATTER SHOULD NOT BE PERMITTED TO DEFEAT A JUST CAUSE
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	WHETHER AN INSTRUMENT CAN BE SAID TO BE VOID OR VOIDABLE AGAINST A PERSON
	SHAM TRANSACTIONS ALLEGATIONS NEEDS ADJUDICATION TO CANCEL IT
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	IF COURT UNABLE TO CONCLUDE WHETHER VERSION OF PLAINTIFF OR DEFENDANT AS TRUE IT WILL BE PLAINTIFF'S FAILURE
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	CONSIDERATION OF HARDSHIP IN SPECIFIC PERFORMANCE SUIT
	MERE MOU'S ARE NOT AGREEMENT FOR SALE – NO ENCUMBRANCE ON PROPERTY
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	IF THE CONTRACT IS REGISTERED AND THERE IS SUBSEQUENT ATTACHMENT, ANY SALE DEED EXECUTED AFTER ATTACHMENT WILL BE VALID
	AGREEMENT AGAINST LAW - NO QUESTION OF ILLEGALITY CAN ARISE UNLESS THE PERFORMANCE OF THE UNLAWFUL ACT WAS NECESSARILY THE EFFECT OF AN AGREEMENT
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	UNLESS THE TRANSFEREE ESTABLISHES THAT HE HAD TAKEN REASONABLE CARE TO ASCERTAIN THE RIGHT OR TITLE OF THE TRANSFEROR AND THE TRANSFEREE HAD ACTED IN GOOD FAITH, THOUGH THE SALE DEEDS ARE FOR VALID CONSIDERATION IS ITSELF HELD TO BE NOT SUFFICIENT TO VALIDATE SUCH TRANSACTION
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	PROCEDURE HAS BEEN DESCRIBED TO BE A HAND-MAID AND NOT A MISTRESS OF LAW
	EVERY STATUTORY PROVISION REQUIRES STRICT ADHERENCE, FOR THE REASON THAT THE STATUTE CREATES RIGHTS IN FAVOUR OF PERSONS CONCERNED
	QUOTING WRONG PROVISION IN APPLICATION DOES NOT PRECLUDE COURT FROM CONSIDERING IT IN WRIGHT PROVISION

	TILL THE LEGISLATURE CORRECTS THE MISTAKE, THE WORDS 'PLAINTIFF'S WITNESSES' WOULD BE READ AS 'DEFENDANT'S WITNESSES' IN ORDER VII RULE 14(4).
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	FRAUD ON COURT - COURTS HAVE BEEN HELD TO HAVE INHERENT POWER TO SET ASIDE AN ORDER OBTAINED BY FRAUD PRACTICED UPON THAT COURT
	EXECUTING COURT CANNOT ENTERTAIN ANY OBJECTION THAT THE DECREE WAS INCORRECT IN LAW OR ON FACTS. UNTIL IT IS SET ASIDE BY AN APPROPRIATE PROCEEDING IN APPEAL OR REVISION
	IF A SUIT PROSECUTED WITHOUT SUCH LEAVE CULMINATES IN A DECREE - SUCH DECREE IS VOIDABLE BUT NOT VOID
	EXECUTING COURT CAN REFUSE TO EXECUTE THE DECREE HOLDING THAT IT HAS BECOME INEXECUTABLE ON ACCOUNT OF THE CHANGE IN LAW
	REASON IS THE SOUL OF LAW - MAXIM 'CESSANTE RATIONES LEGIS CESSAT IPSA LEX', THAT IS TO SAY "REASON IS THE SOUL OF THE LAW, AND WHEN THE REASON OF ANY PARTICULAR LAW CEASES, SO DOES THE LAW ITSELF
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	COMPROMISE DECREE HAD BEEN OBTAINED BY FRAUD IS A QUESTION OF FACT
	A JUDGMENT IS AN OFFICIAL CERTIFICATION OF FACTS
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	IF A JUDGMENT, ORDER OR DECREE HAS BEEN DELIVERED BY A COURT NOT COMPETENT TO DELIVER IT OR IT WAS OBTAINED BY FRAUD OR COLLUSION THEN SUCH JUDGMENT AND DECREE IS LIABLE TO BE IGNORED
	A JUDGMENT OF A COURT IS AN AFFIRMATION, BY THE AUTHORISED SOCIETAL AGENT OF THE STATE
	DECREE IN REPRESENTATIVE SUIT BINDS ALL THOSE WHOSE INTERESTS WERE REPRESENTED EITHER BY THE PLAINTIFFS OR BY THE DEFENDANT
	ORDER OBTAINED BY PLAYING FRAUD ON THE COURT, TRIBUNAL OR AUTHORITY IS A NULLITY AND NON EST IN THE EYE OF THE LAW
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	COMPROMISE - WHEN A COMPROMISE IS ENTERED INTO, THE COURT HAS A DUTY TO SEE AS TO WHETHER THE SAME MEETS THE REQUIREMENTS OF LAW
	ONLY CLERICAL MISTAKES OR ARTHMETICAL MISTAKES IN JUDGMENTS ARISING FROM ANY ACCIDENTAL SLIP OR OMMISSION CAN BE CORRECTED, NO COURT CAN ADD, MODIFY OR ALTER TO THE TERMS OF ITS ORIGINAL JUDGMENT
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	IT IS A SETTLED LEGAL PROPOSITION THAT THE COURT SHOULD NOT SET ASIDE THE ORDER WHICH APPEARS TO BE ILLEGAL, IF ITS EFFECT IS TO REVIVE ANOTHER ILLEGAL ORDER
	IN CASE A PLEA IS RAISED AND NOT CONSIDERED PROPERLY BY THE COURT THE REMEDY AVAILABLE TO THE PARTY IS TO FILE A REVIEW PETITION
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	ORDINARILY THE PRELIMINARY DECREE SETTLES

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	IN A SUIT FOR PARTITION BY A COPARCENER OR CO-SHARER, THE COURT SHOULD NOT GIVE A DECREE ONLY FOR THE PLAINTIFF'S SHARE, IT SHOULD CONSIDER SHARES OF ALL THE HEIRS AFTER MAKING THEM PARTIES AND THEN TO PASS A PRELIMINARY DECREE
	LEGAL REPRESENTATIVES OF THE DECEASED DEFENDANT, AGAINST WHOM THE DECREE FOR INJUNCTION IS PASSED, WOULD BE LIABLE FOR VIOLATION OF THAT DECREE - THROUGH ATTACHMENT OF THE PROPERTY OF THE DECEASED - ARREST AND DETENTION IN CIVIL PRISON CANNOT BE ENFORCED
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	WHAT IS SUBSTANTIAL QUESTION OF LAW- THERE MUST BE FIRST A FOUNDATION FOR IT LAID IN THE PLEADINGS AND THE QUESTION SHOULD EMERGE FROM THE SUSTAINABLE FINDINGS OF FACT ARRIVED AT BY COURT OF FACTS AND IT MUST BE NECESSARY TO DECIDE THAT QUESTION OF LAW FOR A JUST AND PROPER DECISION OF THE CASE
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	SHALL BE MADE RESPONSIBLE TO ENSURE THAT REPLIES TO NOTICES UNDER SECTION 80
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	IMPORTANCE OF SECTION 80 CPC NOTICE TO LITIGATIONS INVOLVED GOVERNMENT
	WHEN PLAINT ON THE FACE OF IT IS BARRED BY LAW – REGARDING SECTION 80 MANDATORY NOTICE
	NO CIVILIZED SYSTEM CAN PERMIT AN EXECUTIVE TO PLAY WITH THE PEOPLE OF ITS COUNTRY AND CLAIM THAT IT IS ENTITLED TO ACT IN ANY MANNER AS IT IS SOVEREIGN.
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COURT CANNOT GRANT BEYOND PLEADINGS

The apex Court in the case of Firm Srinivas Ram Kumar vs. Mahabir Prasad, AIR 1951 SC 177 held thus: "..... The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis.....The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet.....But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit.

WHAT ARE ALL THE PLEADINGS TO BE TAKEN IN CONTRACTUAL MATTER

Supreme Court in Union of India v. Sita Ram, A.I.R. 1977, S.C. 329. In that case the Supreme Court was concerned with the nature of pleadings in a suit under Section 72 of the Contract Act which also deals with a type of quasi contract. The Supreme Court considered as to what were the legal requirements of such a suit and that was required to be pleaded and proved and what would be the effect on the suit if such pleadings were not incorporated in the plaint. Ray C.J. in that connection observed as under:- "The three ingredients to support the cause of action under Section 70 are these. First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is as done or delivered not intending to do so gratuitously. Third, the person to whom the goods are delivered enjoys the benefit thereof. It is and when the three ingredients are pleaded in the plaint that a cause of action is constituted under Section 70 of the Act.Where the plaintiff merely alleges that the goods were not supplied gratuitously, since the other two essential features to constitute a cause of action are lacking, the court commits an error in allowing the plaintiff to go to trial with a claim under Section 70."

ABOUT PLEADINGS

In Virendra Kashinath Ravat v. Vinayak N. Joshi: (1999) 1 SCC 47, the Supreme Court made the following observations with regard to the provisions of Order 6 Rule 2:- —16. That apart, the averment extracted above cannot, by any standards be

dubbed as bereft of sufficiency in pleading. Under Order 6 Rule 2(1) of the Code the requirement is the following: —2. (1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

17. The object of the Rule is twofold. First is to afford the other side intimation regarding the particular facts of the case so that they may be met by the other side. Second is to enable the court to determine what is really the issue between the parties. The words in the sub-rule —a statement in a concise form are definitely suggestive that brevity should be adhered to while drafting pleadings. Of course brevity should not be at the cost of setting out necessary facts, but it does not mean niggling in the pleadings. If care is taken in the syntactic process, pleadings can be saved from tautology. Elaboration of facts in pleadings is not the ideal measure and that is why the sub-rule embodied the words —and contain only just before the succeeding words —a statement in a concise form of the material facts.

18. This Court has indicated the position in *Manphul Singh v. Surinder Singh* [(1973) 2 SCC 599 : AIR 1973 SC 2158]. On a subsequent occasion this Court has again reiterated the principle in *Ganesh Trading Co. v. Moji Ram* [(1978) 2 SCC 91: AIR 1978 SC 484]. Following observations made in the said decision are useful in this context: (SCC p. 93, para 2) —2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other

so that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.

The Supreme Court reiterated its observations in **Mohan Rawale v. Damodar Tatyaba : (1994) 2 SCC 392** to the effect that the distinction between 'material facts' and 'particulars', which together constitute the facts to be proved -- or the *facta probanda* -- on the one hand and the evidence by which those facts are to be proved -- *facta probantia* -- on the other must be kept clearly distinguished. The principle cannot, in our view, be put in better language than that used by Lord Denman, C.J. in *Williams v. Wilcox* (supra). It was quoted with approval by the Supreme Court and which is to the effect that when a state of facts is relied, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegations.

The distinction between material facts and particulars' was, once again, drawn by the Supreme Court in **Harkirat Singh v. Amrinder Singh: (2005) 13 SCC 511** in the following manner:-
—48. The expression —material facts‡ has neither been defined in the Act nor in the Code. According to the dictionary meaning, —material means —fundamental, —vital, —basic, —cardinal, —central, —crucial, —decisive, —essential, —pivotal, —indispensable, —elementary or —primary. [Burton's Legal Thesaurus (3rd Edn.), p. 349.] The phrase —material facts‡,

therefore, may be said to be those facts upon which a party relies for its claim or defence. In other words, —material facts‖ are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be —material facts‖ would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party. —51. A distinction between —material facts‖ and —particulars‖, however, must not be overlooked. —Material facts‖ are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. —Particulars‖, on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. —Particulars thus ensure conduct of fair trial and would not take the opposite party by surprise.

52. All material facts must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.

Supreme Court in Om Prakash Srivastava v. Union of India:

(2006) 6 SCC 207 observed as under:- 9. By —cause of action|| it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. (See Bloom Dekor Ltd. v. Subhash Himatlal Desai [(1994) 6 SCC 322]) 12. The expression cause of action|| has acquired a judicially settled meaning. In the restricted sense cause of action|| means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above, the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in cause of action. (See Rajasthan High Court Advocates' Assn. v. Union of India [(2001) 2 SCC 294]). (underlining added) The Supreme Court in the said decision clearly held that every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, is comprised in the cause of action'.

**Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust,
Virudhunagar Vs. Chandran and others,
MANU/SC/0147/2017 : (2017) 3 SCC 702** in para 22 as under:

"Unless there is a pleading especially with regard to the source of title, the defendant of a suit has no opportunity to rebut such pleading thus an evidence with regard to which there is no pleading cannot be relied upon by the plaintiff for setting up his title in a suit".

**ORAL EVIDENCE WITHOUT PLEADING ARE IN ADMISSIBLE
PLEADINGS WITHOUT EVIDENCE ARE ALSO IN ADMISSIBLE**

It is well settled law that any amount of oral evidence without pleading are in admissible. Pleadings without evidence are also in admissible. Therefore, the Appellate Court relied upon the decision in the case of Anathula Sudhakar vs. P. Busbi Reddy (Dead) by LRs. and others reported in MANU/SC/7376/2008 : 2008 (3) KCCR 1769 has held pleadings absent -- no amount of evidence could be looked into.

A DECISION OF A CASE CANNOT BE BASED ON GROUNDS OUTSIDE THE PLEADINGS OF THE PARTIES

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J.,

Court while dealing with an issue in Kalyan Singh Chouhan v. C.P. Joshi, AIR 2011 SC 1127, after placing reliance on a very large number of its earlier judgments including Messrs. Trojan & Co. v. RM.N.N. Nagappa Chettiar, AIR 1953 SC 235; Om Prakash Gupta v. Ranbir B. Goyal, AIR 2002 SC 665; Ishwar Dutt v. Land Acquisition Collector & Anr., AIR 2005 SC 3165; and State of Maharashtra v. M/s. Hindustan Construction Company Ltd., AIR 2010 SC 1299, held that relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in absence of the pleadings in that respect. No party can be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon.

63. In Bachhaj Nahar v. Nilima Mandal & Ors., AIR 2009 SC 1103, this court held that a case not specifically pleaded can be considered by the court unless the pleadings in substance contain the necessary averments to make out a particular case and issue has been framed on the point. In absence of pleadings, the court cannot make out a case not pleaded, suo motu.

CASE LAW ON PLEADINGS

The National Textile Corporation Ltd. vs. Nareshkumar Badrikumar Jagad and Ors.: MANU/SC/1028/2011 Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ.

In Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College and Ors. MANU/SC/0043/1987 : AIR 1987 SC 1242, Court held as under: ...in the absence of pleadings, evidence if any, produced by the parties cannot be considered.... No. party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. Similar view has been reiterated in *Bachhaj Nahar v. Nilima Mandal and Ors.* MANU/SC/8199/2008 : AIR 2009 SC 1103.

In Kashi Nath (Dead) through L.Rs. v. Jaganath MANU/SC/0882/2003 : (2003) 8 SCC 740, Court held that "where the evidence is not in line of the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon."

Same remain the object for framing the issues under Order XIV Code of Civil Procedure and the court should not decide a suit on a matter/point on which No. issue has been framed. (Vide: Biswanath Agarwalla v. Sabitri Bera and Ors. MANU/SC/1452/2009 : (2009) 15 SCC 693;

In Syed and Company and Ors. v. State of Jammu and Kashmir and Ors. : 1995 Supp (4) SCC 422, Court held as under: Without specific pleadings in that regard, evidence could not be led in since it is settled principle of law that No. amount of evidence can be looked unless there is a pleading. Therefore, without amendment of the pleadings merely trying to lead evidence is not permissible.

In Chinta Lingam and Ors. v. The Govt. of India and Ors. MANU/SC/0045/1970 : AIR 1971 SC 474, Court held that unless factual foundation has been laid in the pleadings No. argument is permissible to be raised on that particular point.

In J. Jermons v. Aliammal and Ors. MANU/SC/0477/1999 : (1999) 7 SCC 382, while dealing with a similar issue, Court held as under: there is a fundamental difference between a case of

raising additional grounds based on the pleadings and the material available on record and a case of taking a new plea not borne out of the pleadings. In the former case No. amendment of pleading is required, whereas in the latter it is necessary to amend the pleadings... The Respondents cannot be permitted to make out a new case by seeking permission to raise additional grounds in revision.

The National Textile Corporation Ltd. vs. Nareshkumar Badrikumar Jagad and Ors.: MANU/SC/1028/2011 In view of the above, the law on the issue stands crystallised to the effect that a party has to take proper pleadings and prove the same by adducing sufficient evidence. No. evidence can be permitted to be adduced on a issue unless factual foundation has been laid down in respect of the same. There is No. quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which No. inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings.

The reliefs claimed do not constitute the cause of action. On the contrary, they constitute the entitlement, if any, on the basis of pleaded facts. What is required in law is not the piecemeal reading of the plaint but in its entirety. Whether the reliefs would be granted on the pleaded facts and the evidence adduced is totally different from the relief claimed. All the reliefs claimed may not be allowed to a party on the pleadings and the evidence adduced. Whether part of the relief cannot be granted by the civil

court is a different matter from saying that because of a combined claim of reliefs, the jurisdiction is ousted or no cause of action is disclosed. Considering the reliefs claimed vis-a-vis the pleadings would not mean compartmentalization or segregation, in that sense. *Sopan Sukhdeo Sable and Ors. vs. Assistant Charity Commissioner and Ors.* (23.01.2004 - SC) : MANU/SC/0071/2004

In Saleem Bhai and Ors. v. State of Maharashtra and Ors. MANU/SC/1185/2002 : [2002] SUPP 5 SCR 491 it was held with reference to Order VII Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial Court can exercise the power at any stage of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under Clauses (a) and (d) of Order VII Rule 11 of the Code, the averments in the plaint are the germane: the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.

I.T.C. Ltd. v. Debts Recovery Appellate Tribunal and Ors. MANU/SC/0968/1998 : AIR1998SC634 it was held that the basic question to be decided while dealing with an application filed under Order VII Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order VII Rule 11 of the Code.

The trial Court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order VII Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order X of the Code. (See T. Arivandandam v. T.V. Satyapal and Anr. MANU/SC/0034/1977 : [1978]1SCR742).

Sopan Sukhdeo Sable and Ors. vs. Assistant Charity Commissioner and Ors.: MANU/SC/0071/2004 There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction or words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

Order VI Rule 2(1) of the Code states the basic and cardinal rule of pleadings and declares that the pleading has to state material facts and not the evidence. It mandates that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

There is distinction between 'material facts' and 'particulars'. The words 'material facts' show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad.

Court in Samant N. Balkrishna v. George Fernandez MANU/SC/0270/1969 : [1969] 3 SCR 603 , and the distinction between "material facts" and "particulars" was brought out in the following terms: The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet.

Sopan Sukhdeo Sable and Ors. vs. Assistant Charity Commissioner and Ors.: MANU/SC/0071/2004 - Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself,

irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant.

Under Order II Rule 1 of the Code which contains provisions of mandatory nature, the requirement is that the plaintiffs are duty bound to claim the entire relief. The suit has to be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. Rule 2 further enjoins on the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If the plaintiff omits to sue or intentionally relinquishes any portion of his claim, it is not permissible for him to sue in respect of the portion so omitted or relinquished afterwards.

Sangramsinh P. Gaekwar and Ors. v. Shantadevi P. Gaekwad (Dead) through LRs. and Ors. MANU/SC/0052/2005 : AIR2005SC809 , wherein it is stated: ... admissions if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of

proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong. On the other hand, it is admitted that due to slump in the market they could not sell the goods, realise the price of the finished product and pay back the loan to the Bank. That admission stands in their way to plead at the later stage that they suffered loss on account of the deficiency in service. Judicial admissions by themselves can be made the foundations of the rights of the parties.

Union of India v. Pramod Gupta (Dead) by LRs. and Ors.
MANU/SC/0549/2005 : AIR2005SC3708 Court held: Before an amendment can be carried out in terms of Order 6 Rule 17 of the Code of Civil Procedure the court is required to apply its mind on several factors including viz. whether by reason of such amendment the claimant intends to resile from an express admission made by him. In such an event the application for amendment may not be allowed.

In Punjab National Bank v. Indian Bank and Anr.
MANU/SC/0339/2003 : [2003] 3 SCR 836 ,Court opined that an application for amendment may be allowed to clarify the relief which had been prayed for even in the plaint, particularly, when no prejudice in this behalf would be caused to the other party to the lis.

In Rajesh Kumar Aggarwal and Ors. v. K.K. Modi and Ors. MANU/SC/8043/2006 : AIR2006SC1647 , while emphasizing on the underlined principles of Order VI Rule 17 of the Code of Civil Procedure, it was held: 15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

20. ...The court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. There is a plethora of precedents pertaining to the grant or refusal of permission for amendment of pleadings. The various decisions rendered by this Court and the proposition laid

down therein are widely known. This Court has consistently held that the amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice.

Gurdial Singh and Ors. vs. Raj Kumar Aneja and Ors.:

MANU/SC/0077/2002 Once a prayer for amendment is allowed the original pleading should incorporate the changes in a different ink or an amended pleading may be filed wherein with the use of a highlighter or by underlining in red the changes made may be distinctly shown. The amendments will be incorporated in the pleading by the party with the leave of the Court and within the time limited for that purpose or else within fourteen days as provided by Order 6 Rule 18 of the CPC. The Court or an officer authorised by the Court in this behalf, may compare the original and the amended pleading in the light of the contents of the amendment application and the order of the Court permitting the same and certify whether the amended pleading conforms to the order of the Court permitting the amendment. Such practice accords with the provisions of Code of Civil Procedure and also preserves the sanctity of record of the Court. It is also conducive to the ends of justice in as much as by a bare look at the amended pleading the Court would be able to appreciate the shift in stand. If any between the original pleading and the amended pleading. These advantages are in addition to convenience and achieving maintenance of discipline by the parties before the Court. Amendments and consequential amendments allowed by the Cot and incorporated in the original

pleadings, would enable only one set of pleadings being available on record and that would avoid confusion and delay at the trial.

When one of the parties has been permitted to amend his pleading, an opportunity has to be given to the opposite party to amend his pleading. The opposite party shall also have to make an application under Order 6 Rule 17 of the CPC which of course would ordinarily and liberally be allowed. Such amendments are known as a consequential amendments.

United Bank of India vs. Naresh Kumar and Ors.:

MANU/SC/0002/1997 It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the CPC a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company. Order 29 Rule 1 of the CPC, therefore, provides that in a suit by or against a corporation the secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6 Rule 14 together with Order 29 Rule 1 of the CPC it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and hors Order 29 Rule 1 of the CPC, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded

as sufficient compliance with the provisions of Order 6 Rule 14 of the CPC. A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer.

Federal Mogul Goetze (India) Ltd. vs. The Assistant Commissioner of Commercial Taxes and Ors. :

MANU/KA/1542/2010 Order VI Rule 14 of Code of Civil Procedure which requires that every pleading be signed by a party and the pleader and if there were to be any bona fide omission, it has been held that the defect can be permitted to be rectified at any time before judgment and even by the appellate Court by permitting appropriate amendment, when such defect is noticed during hearing. 12. Section 26 and Order VI and VII of Code of Civil Procedure concern the institution of suits. The plaint must be filed in accordance with law. Since rules of procedure are made to further the cause of justice and not to prove a hindrance thereto, since procedural enactments ought not to be construed in a manner which would prevent the Court from meeting the ends of justice in different situations, in my

opinion, Rule 15 under Order VI has to be treated as directory in nature and non compliance thereof would not automatically render the plaint as barred by law to invoke Clause (d) of Rule 11 under Order VII of Code of Civil Procedure.

In the case of Kailash v. Nanhku and Ors. reported at AIR 2005 SCW 2346, while considering the amended provisions of Order VIII Rule 1 of Code of Civil Procedure, it has been held that, the provisions of the Code or any other procedural enactment ought not to be in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice. Apex Court has observed that, merely because the provision of law is couched in negative in employing a mandatory character, the same is not without exceptions and the direction contained regarding the period for filing written statement under Order VIII Rule 1 of the Code is directory and not mandatory, being procedural law.

PLEADINGS IN ADVERSE POSSESSION

Supreme Court in *Madhvakrishna & Anr. v. Chandra Bhaga & Ors.* (1997) 2 SCC 203, has held thus: "5. In this case, except repeating the title already set up but which was negative in the earlier suit, namely, that they had constructed the house jointly with Mansaram, there is no specific plea of disclaiming the title of the appellants from a particular date, the hostile assertion thereof and then of setting up adverse possession from a particular date to the knowledge of the appellants and of their

acquiescence. Under these circumstances, unless the title is disclaimed and adverse possession with hostile title to that of the Mansaran and subsequently as against the appellant is pleaded and proved, the plea of adverse possession cannot be held proved. In this case, such a plea was not averred nor evidence has been adduced. The doctrine of adverse possession would arise only when the party has set up his own adverse title disclaiming the title of the plaintiff and established that he remained exclusively in possession to the knowledge of the appellant's title hostile to their title and that the appellant had acquiesced to the same."

A PERSON PLEADING ADVERSE POSSESSION HAS NO EQUITIES IN HIS FAVOR

The Hon^{ble} Supreme Court of India in the case titled as State of Haryana vs. Mukesh Kumar & Ors. AIR 2012 SC 559, observed as under:- "35. A person pleading adverse possession has no equities in his favor since he is trying to defeat the rights of the true owner. It is for him to clearly plead and establish all facts necessary to establish adverse possession. Though we got the law of adverse possession from the British, it is important to note that these days English Courts are taking a very negative view towards the law of adverse possession. The English law was amended and changed substantially to reflect these changes, particularly in light of the view that property is a human right adopted by the European Commission."

ADDITIONAL PROPERTY MENTIONED IN WRITTEN STATEMENT CAN BE ADDED AT A LATER STAGE

Hon'ble Supreme Court judgment in the case of S. **SATNAM SINGH AND OTHERS .vs. SURENDER KAUR AND ANOTEHR reported in AIR 2009 SC 1809** to the effect that additional property, if any mentioned in the written statement can be added at a later stage in the list of the properties.

SELLER CANNOT TAKE ADVANTAGE OF THEIR OWN WRONG AND THEN PLEAD THAT THE GRANT OF DECREE OF SPECIFIC PERFORMANCE WOULD BE INEQUITABLE

Ramathal vs. Maruthathal and Ors.: MANU/SC/1154/2017 -

The buyer has taken prompt steps to file a suit for specific performance as soon as the execution of the sale was stalled by the seller. From this discussion, it is clear that the buyer has always been ready and willing to perform his part of the contract at all stages. Moreover it is the seller who had always been trying to wriggle out of the contract. Now the seller cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would be inequitable. Escalation of prices cannot be a ground for denying the relief of specific performance. Specific performance is an equitable relief and granting the relief is the discretion of the court. The discretion has to be exercised by the court judicially and within the settled principles of law

PLEA OF NON-MAINTAINABILITY IS A LEGAL PLEA

Supreme Court in the case of State of Rajasthan v. Kalyan Singh, A.I.R. 1971 S.C. 2018, Hagde, J. speaking for the Supreme Court in the aforesaid case held that plea of non-maintainability of suit is a legal plea and can be accepted although no specific plea was taken or precise issue framed. In this connection, it is observed that the plea of maintainability of the suit is essentially a legal plea. If the suit on the face of it is not maintainable, the fact that no specific pleas were taken or no precise issues were framed is of little consequences.

CAUSE OF ACTION

M/S. Kusum Ingots & Alloys Ltd vs Union Of India And Anr [(2004) 6 SCC 254] The Hon'ble Supreme Court observed: "Cause of action implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitutes the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted inter alia to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Negatively put, it would mean that everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action. Its importance is beyond any doubt. For every action, there has to be a cause of action, if not,

the plaint or the writ petition, as the case may be, shall be rejected summarily."

In Om Prakash Srivastava v. Union of India and Another [(2006) 6 SCC 207], Supreme Court held: "12. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above, the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in "cause of action".

In Devasahayam (D) by LRs. v. P. Savithramma and Ors. [(2005) 7 SCC 653], Supreme Court opined: "The pleadings as are well-known must be construed reasonably. The contention of the parties in their pleadings must be culled out from reading the same as a whole. Different considerations on construction of pleadings may arise between pleadings in the mofussil court and pleadings in the Original Side of the High Court."

Hon'ble Apex Court in the case of Nagabhushanammal (D) by LRs v. C. Chandikeshwaralingam reported in MANU/SC/

0231/2016 : wherein it is categorically held that, "the expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. 'Cause of action' has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse."

The expression 'cause of action' came to be interpreted by this Court in **Kunjan Nair Sivaraman Nair v. Narayanan Nair MANU/SC/0101/2004 : (2004) 3 SCC 277**, at paragraph-16. To quote: 16. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which would be necessary for the Plaintiff to

prove, if traversed, in order to support his right to the judgment of the court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises in "cause of action".

SUBSEQUENT CAUSE OF ACTION IN THE MATTER OF IMPLEMENTATION OF JUDGMENT - CAN BE CHALLENGED

State of Haryana and Others v. M.P. Mohla [(2007) 1 SCC 457] that if a subsequent cause of action arises in the matter of implementation of a judgment and order, the fresh cause of action can be subjected to a legal challenge.

COURT SHOULD SCRUTINIZE PLAINT AND DOCUMENTS TO FIND OUT WHETHER THERE IS CAUSE OF ACTION

Raptakos Brett & Co. Ltd. v. Ganesh Property, 1998 (7) SCC 184, is an authority for the proposition that the averments in the plaint as a whole have to be seen to see whether Clause (d) of Rule 11 of Order VII is applicable. It has also been held that to consider whether the proceeding discloses a cause of action, the Court should not scrutinize only the plaint, but also the documents filed along with it; - (See Liverpool & London S.P. & I

Asson. Ltd. v. M.V. Sea Success I and Anr., 2004 (9) SCC 512. Having given due consideration to these aspects if the Court concludes that taken as a whole, the pleadings and evidence do not disclose a cause of action, the plaint must be rejected. The public policy compulsion underlying this course of action was spelt out by the Supreme Court in T. Arivandandam v. T.V. Satyapal and Anr (1977) 4 SCC 467 where it was held, that if on a meaningful -not formal- reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order VII Rule 11, CPC.

SPECIFIC PLEADINGS

Supreme Court in the case of Bhagwati Prasad v. Chandramaul, AIR 1966 SC 735 : , in the following words (at page 738) :-- ".....If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is; did the parties

know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

Supreme Court in the case of Ram Sarup Gupta v. Bishun Narain Inter College, AIR 1987 SC 1242, and their Lordships held as follows (at page 1246) :-- ".....It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a legal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue

emphasis on forms, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial, once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

Shri H.D. Vashishta v. Glaxo Laboratories (P) Ltd., AIR 1979 SC 134, wherein it was held that if materials facts constituting cause of action is not averred in the plaint the suit will fail.

The Hon'ble Supreme Court of India in the case reported in (1994) 6 SCC Pg.322 (Bloom Dekor Limited Vs. Subhash Himat Lal Desai) had explained what the expression "cause of action" means. We extract the same hereunder: "By "cause of action" it meant every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit"

Pratibha Rani vs Suraj Kumar & Anr AIR 1985 SC 628
 "Entertaining complaints of the irate wife or husband against the husband or wife without even an allegation of a specific and separate agreement constituting entrustment of the property of

the wife of the husband would have disastrous effects and consequences on the peace and harmony which ought to prevail in matrimonial homes. The fact that no instance of any case of successful prosecution of the husband or wife at the instance of the wife or the husband could be brought to the notice of the Supreme Court in the course of the arguments in this appeal would show that the spouses had not lightly rushed in the past to criminal courts with complaints of criminal breach of trust against the other spouses though in the day-to-day life. There must have been numerous instance where the wife had used the property or cash of the husband for purposes different from the one for which they were given by the husband to be applied by the wife and vice-versa. Therefore, the minimum requirement in such cases is a specific separate agreement whereby the property of the wife or husband was entrusted to the husband or wife and or his or her close relations. In the absence of such a specific separate agreement in the present case the complaint was rightly quashed.”

OMISSION OF A SINGLE MATERIAL FACT LEADS TO AN INCOMPLETE CAUSE OF ACTION 1969 SC

SAMANT N.BALKRISHNA AND ANOTHER V GEORGE FERNANDEZ AND OTHERS 1969 (3) SCC 238 with regard to showing in the election petition the concise statement of material facts with reference to Section 83 of the Act, 1951, wherein it was held thus: “The Section is mandatory and requires first a concise statement of material facts and then requires the fully possible particulars. What is the the difference between material facts and

particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet.”

MATERIAL FACTS TO BE STATED IN DETAILS TO ENSURE THAT OPPOSITE PARTY IS NOT TAKEN BY SURPRISE 2009 SC

RAM SUKH V DINESH AGGARWAL (2009) 10 SCC 541 on the ground that what are the material facts with reference to the election law, wherein it was held thus (para 15): AT this juncture, in order to appreciate the real object and purport of the phrase "material facts", particularly with reference to election law, it would be appropriate to notice distinction between the phrases "material facts" as appearing in clause (a) and "particulars" as appearing in clause (b) of sub- section (1) of Section 83. As stated above, "material facts" are primary or basic facts which have to be pleaded by the petitioner to prove his cause of action and by the defendant to prove his defence. "particulars", on the other hand, are details in support of the material facts, pleaded by the parties. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. Unlike "material facts" which provide the basic foundation on which the entire edifice of the election

petition is built, "particulars" are to be stated to ensure that opposite party is not taken by surprise."

MATERIAL FACTS WOULD INCLUDE POSITIVE STATEMENT OF FACTS AS ALSO POSITIVE AVERMENT OF A NEGATIVE FACT, IF NECESSARY 2001 SC

HARI SHANKAR JAIN V SONIA GANDHI (2001) 8 SCC 233

with regard to material facts on which election petition should contain, wherein it was held thus (para 23): "SECTION 83 (1) (a) of RPA, 1951 mandates that an election petition shall - contain a concise statement of the material facts on which the petitioner relies. By a series of decisions of this Court, it is well-settled that the material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of civil Procedure, 1908. The expression 'cause of action' has been compendiously defined to mean every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. Merely quoting the words of the section like chanting of a mantra does not amount to stating material facts.

Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary.

MATERIAL FACTS ARE SUCH PRELIMINARY FACTS WHICH MUST BE PROVED AT THE TRIAL BY A PARTY TO ESTABLISH EXISTENCE OF A CAUSE OF ACTION 1999 SC

In V. S. Achuthanandan v. P. J. Francis and Anr. [jt 1999 (2) SC 347= (1999) 3 SCC 737], Court has held, "...on a conspectus of a series of decisions of this Court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead material facts is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time-limit prescribed for filing the election petition.

THE DEFECT OF VERIFICATION IS NOT FATAL TO THE PETITION; IT CAN BE CURED 1991 SC

Supreme Court in **F. A. Sapa v. Singora, AIR 1991 SC 1557 : (1991 AIR SCW 1492)**, the object of requiring verification of an election petition is to clearly fix the responsibility for the averments and allegations in the petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts. However, the defect of verification is not fatal to the petition; it can be cured In the present case the defect in verification was pointed out by raising a plea in that regard in the written statement. The

objection was pressed and pursued by arguing the same before the Court. However, the petitioner persisted in pursuing the petition without proper verification which the petitioner should not have been permitted to do. In our opinion, unless the defect in verification was rectified, the petition could not have been tried. For want of affidavit in required form and also for lack of particulars, the allegations of corrupt practice could not have been enquired into and tried at all. In fact, the present one is a fit case where the petition should have been rejected at the threshold for non-compliance with the mandatory provisions of law as to pleadings"

SPECIFIC WRITTEN PLEADINGS AND SHOULD NOT BE PERMITTED TO DEVIATE FROM THEM BY WAY OF MODIFICATION OR SUPPLEMENTATION EXCEPT THROUGH AMENDMENT

S S. Sharma & Ors vs Union Of India & Ors 1981 AIR 588, 1981 SCR (1)1184 The Courts should ordinarily insist on the parties being confined to their specific written pleadings and should not be permitted to deviate from them by way of modification or supplementation except through the well-known process of formally applying for amendment. It is not that justice should be available to only those who approach the court confined in a straight jacket; but there is a procedure known to the law, and long established by codified practice and good reason, for seeking amendment of the pleadings. If undue laxity

and a too easy informality is permitted to enter the proceedings of a court, it will not be long before a contemptuous familiarity assails its institutional dignity and ushers in chaos and confusion undermining its effectiveness.

In **(2004)9 SCC 512 - Liverpool vs. M. V. Sea** it has been held as follows:- “Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown. So long as the claim discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars.”

In **Sopan Sukhdeo Sable and Ors. Vs. Assistant Charity Commissioner and Ors., (2004) 3 SCC 137**, this Court held

thus: "15. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction or words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities."

WHEN RIGHT TO SUE ACCRUES

In GANNON DUNKERLEY AND CO. LTD. v. THE UNION OF INDIA, 1970 AIR 1433, 1970 SCR (3) 47 it has been held thus: "In our Judgment, there is no right to sue until there is an accrual of the right asserted in the suit, and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

In C. MOHAMMAD YUNUS v. SYED UNNISSA AND ORS., 1961 AIR 808, 1962 SCR (1) 67 it has been further reiterated that there could be no right to sue until there is an accrual of the

right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right'. There is no such clear and unequivocal infringement of the right of the plaintiffs or real threat to the right of the plaintiffs by the entries which have no legal effect in the eye of law.

Mst. Rukhmabai vs Lala Laxminarayan And Others 1960 AIR 335, 1960 SCR (2) 253 The right to sue under art. 120 of the Limitation Act accrued when the defendant clearly and unequivocally threatened to infringe the right asserted by the plaintiff. Every threat to such a right was not a clear and unequivocal threat as to compel the plaintiff to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

It may be relevant to notice the facts of Rukmabai's case as stated in para-34 of the very Judgment which are as follows:

"The facts relevant to the question of limitation in the present case may be briefly restated: The trust deed was executed in 1916. The suit house was constructed in 1920. If, as we have hold, the trust deed as well as the construction of the building were for the benefit of the family, its execution could not constitute any invasion of the plaintiff's right. Till 1926, the plaintiff's father, Ratanlal was residing in that house. In 1928 when Daga challenged the trust deed, the family compromised the matter and salvaged the house. From 1936 onwards the plaintiff has been residing in the suit house. It is conceded that he had knowledge of the litigation between Rukmabai and

Chandanlal claiming the property under the trust deed; but, for that suit he was not a party and the decision in that litigation did not in any way bind him or affect his possession of the house. But in execution of the decree, the Commissioner appointed by the Court came to the premises on February 13, 1937, to take measurements of the house for affecting partition of the property, when the plaintiff raised objection, and thereafter in 1940 filed the suit. From the aforesaid facts, it is manifest that the plaintiff's right to the property was not effectively threatened by the appellant till the Commissioner came to divide the property. It was only then there was an effectual threat to his right to the suit property and the suit was filed within six years thereafter. We, therefore, hold that the suit was within time."

ENTRIES IN REVENUE RECORDS DOES NOT BE THE CAUSE OF ACTION

In **RAGHUBIR JHA v. STATE OF BIHAR AND ORS., AIR 1986 SC 508, 1986 Supp (1) SCC 372** the Supreme Court held that the limitation would begin to commence only on the communication of the termination of the proceedings and not on the date the order was passed by the first authority. In the instant case, there is no evidence adduced by the defendant nor there is any material brought on record in the cross examination of P.W.1 that right to sue accrued much earlier to the date of the suit. As in the instant case the entries in the record of rights, being non-est cannot be held to affect the right, title and interest of the plaintiffs and their predecessors-in-title in possession of

the suit property. Such entries cannot also be held to be a threat to the title of the plaintiffs who are in possession of the suit property so as to give rise to the cause of action sufficient for commencement of the period of limitation.

PLEADINGS, PROOF AND RELIEF

Apex Court in **Ritesh Tiwari v. State of U.P. and others (2010) 10 SCC 677**, in paragraph 24 and 25 held as under:- "It is a settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the petition and in case the pleadings are not complete, the Court is under no obligation to entertain the pleas. In *Bharat Singh v. State of Haryana* (1988) 4 SCC 534, this Court has observed as under: (SCC p.543,Para 13) :- "... In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the Code of Civil Procedure and a writ petition or a counter- affidavit. While in a pleading, i.e. a plaint or written statement, the facts and not the evidence are required to be

pleaded. In a writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

Apex Court in **National Textile Corporation Limited v. Nareshkumar Badrikumar Jagad and others (2011) 12 SCC 695** in paragraph 12 to 19 held as under:- "Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: M/s. Trojan & Co. v. Nagappa Chettiar, AIR 1953 SC 235; State of Maharashtra v. M/s. Hindustan Construction Co. Ltd., (2010) 4 SCC 518; and Kalyan Singh Chouhan v. C.P. Joshi, (2011) 11 SCC 786).

In **Ram Sarup Gupta v. Bishun Narain Inter College (1987) 2 SCC 555**, Court held as under: "6..... in the absence of pleadings, evidence if any, produced by the parties cannot be considered..... no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it." Similar

view has been reiterated in *Bachhaj Nahar v. Nilima Mandal* (2008) 17 SCC 491.

In **Kashi Nath v. Jaganath, (2003) 8 SCC 740**, Court held that where the evidence is not in line of the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon. Same remain the object for framing the issues under Order XIV CPC and the court should not decide a suit on a matter/point on which no issue has been framed. (Vide: *Biswanath Agarwalla v. Sabitri Bera* (2009) 15 SCC 693;

In **Syed and Co. v. State of J & K, 1995 Supp (4) SCC 422**, Court held as under: "7...Without specific pleadings in that regard, evidence could not be led in since it is settled principle of law that no amount of evidence can be looked unless there is a pleading. Therefore, without amendment of the pleadings merely trying to lead evidence is not permissible."

In **Chinta Lingam v. The Govt. of India (1970) 3 SCC 768**, Court held that unless factual foundation has been laid in the pleadings no argument is permissible to be raised on that particular point.

In **J. Jermans v. Aliammal (1999) 7 SCC 382**, while dealing with a similar issue, Court held as under: ". there is a fundamental difference between a case of raising additional grounds based on the pleadings and the material available on record and a case of taking a new plea not borne out of the

pleadings. In the former case no amendment of pleading is required, whereas in the latter it is necessary to amend the pleadings... ..The respondents cannot be permitted to make out a new case by seeking permission to raise additional grounds in revision."

There is no quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings. (See : M/s Sanghvi Reconditioners Pvt. Ltd. v. Union of India **(2010) 2 SCC 733**; and Greater Mohali Area Development Authority v. Manju Jain **(2010) 9 SCC 157**]."

In State of Orissa and another v. Mamata Mohanty (2011) 3 SCC 436 the Apex Court in paragraph 55 held as below:- "Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : Sri

Mahant Govind Rao v. Sita Ram Kesho (1897-98) 25 Ind. App. 195 (PC) ; Trojan & Co. v. Nagappa Chettiar, AIR 1953 SC 235 ; Ishwar Dutt v. Land Acquisition Collector (2005) 7 SCC 190 ; and State of Maharashtra v. Hindustan Construction Co. Ltd., (2010) 4 SCC 518).

The Apex Court in **Manohar Lal v. Urgasen and others (2010) 11 SCC 557** has held in paragraph 30 as under:- "30 In Trojan & Co. v. Nagappa Chettiar, Court considered the issue as to whether relief not asked for by a party could be granted and that too without having proper pleadings. The Court held as under; [AIR p. 240, para 22] "22.....It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

CAUSE OF ACTION

GURDIT SINGH AND ORS. ETC. Vs. MUNSHA SINGH AND ORS. ETC. AIR 1977 SC 640

Beg. .J. (Dissenting) Observed: The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circum- stances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of

material facts which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit.

MATERIAL FACTS

Mahadeorao Sukaji Shivankar Vs. Ramaratan Bapu & Ors (2004) 7 SCC 181 "material facts" are facts upon which the plaintiff's cause of action or defendant's defence depends. Broadly speaking, all primary or basic facts which are necessary either to prove the cause of action by the plaintiff or defence by the defendant are "material facts". Material facts are facts which, if established, would give the petitioner the relief asked for. But again, what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down.

In Harkirat Singh v. Amrinder Singh (2005) 13 SCC 511, Court again reiterated the distinction between 'material facts' and 'material particulars' and observed as under: "51. A distinction between "material facts" and "particulars", however, must not be overlooked. "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it

full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise. 52. All "material facts" must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

NO AMOUNT OF EVIDENCE CAN BE LOOKED INTO WITH RESPECT TO WHICH THERE IS NO PLEADING

Supreme Court in the case of **Bhaskar Woman Joshi v. Shrinarayan Ram Bilas Agrawal, AIR 1960 SC 301**. It has been held therein the question whether by incorporation of condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of deed interpreted in the light of surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the decree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relationship of a mortgagor and the mortgagee, the price being charged on the conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is a price charged upon

the conveyed, but the sale is subject to an obligation to retransfer within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The learned counsel when confronted with the written statement had to accept that there is no plea of any loan transaction between the parties. The relationship of creditor and debtor has not been pleaded. The defendant appellant has not come forward with the case that it was not a sale transaction but was a mortgage transaction. The only plea raised in the written statement in paras 6 and 7 thereof is that the sale deed in question dated 10.5.1985 is a complete outright sale deed and that the condition of reconveyance is illegal and ineffective and that the said condition cannot be in force being the sale deed an unilateral document. Parties cannot be permitted to travel beyond their pleadings. No amount of evidence can be looked into with respect to which there is no pleading. Apart from the fact that no such plea was set up in the written statement, there is no evidence nor material on record to support the said plea.

Apex Court's decision in Narmada Bachao Andolan v. State of Madhya Pradesh & Anr. AIR 2011 SC 1989 It is a settled proposition of law that a party has to plead its case and produce/adduce sufficient evidence to substantiate the averments made in the petition and in case the pleadings are not complete the Court is under no obligation to entertain the pleas.

In Bharat Singh & Ors. v. State of Haryana & Ors., AIR 1988 SC 2181, Court has observed as under:- “In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the Code of Civil Procedure and a writ petition or a counter- affidavit. While in a pleading, i.e. a plaint or written statement, the facts and not the evidence are required to be pleaded. In a writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.” A similar view has been reiterated by this Court in *Larsen & Toubro Ltd. & Ors. v. State of Gujarat & Ors.*, AIR 1998 SC 1608; *M/s Atul Castings Ltd. v. Bawa Gurvachan Singh*, AIR 2001 SC 1684; and *Rajasthan Pradesh V.S. Sardarshahar & Anr. v. Union of India & Ors.*, AIR 2010 SC 2221.

Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question(s) in issue, so that the parties may adduce appropriate evidence on the said

issue. It is settled legal proposition that “as a rule relief not founded on the pleadings should not be granted.” Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. If any factual or legal issue, despite having merit, has not been raised by the parties, the court should not decide the same as the opposite counsel does not have a fair opportunity to answer the line of reasoning adopted in that regard. Such a judgment may be violative of the principles of natural justice. (Vide: Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter-College & Ors., AIR 1987 SC 1242; and Kalyan Singh Chouhan v. C.P. Joshi, AIR 2011 SC 1127).

.....The technicalities of the rules of pleading cannot be made applicable vigorously. Pleadings prepared by a layman must be construed generously as he lacks standard of accuracy and precision particularly when a legal wrong is caused to a determinate class. (Vide: A. Hamsaveni & Ors. v. State of Tamil Nadu & Anr., (1994) 6 SCC 51; Ashok Kumar Pandey v. State of West Bengal, AIR 2004 SC 280; Prabir Kumar Das v. State of Orissa & Ors., (2005) 13 SCC 452; and A. Abdul Farook v. Municipal Council, Perambalur, (2009) 15 SCC 351).

PLEADINGS ABOUT FRAUD

Afsar Sheikh And Anr vs Soleman Bibi And Ors 1976 AIR 163, 1976 SCR (2) 327

The pleas of undue influence, fraud and misrepresentation are in law distinct categories and are somewhat inconsistent with one another. In view of O 6, r.4 read with O.6, r.2, C.P.C. they are required to be separately pleaded with specificity, particularity and precision. The specific case set up in the plaint was that the document was vitiated by fraud and misrepresentation practised by the appellant. A general allegation in the plaint that the plaintiff was a simple old man of 90 years who had reposed great confidence in the appellant was totally insufficient to amount to an averment of undue influence Apart from this general and nebulous allegation no particulars of undue influence were pleaded. Even the mere relationship between the plaintiff and the appellant (appellant was the grandson of the sister of the mother of the plaintiff) was not disclosed. It was not particularised how the appellant was in a position to dominate the will of the plaintiff, in what manner he exercised that influence, and how it was 'undue' influence. All that has been said in the written statement was that the relationship subsisting between the plaintiff and the appellant was marked by love and affection and was akin to that of father and son. This pleading could not be reasonably construed as an admission that he was in a position to dominate the will of the plaintiff. Normally, it would be the father and not the son who would be in a position of dominating influence. the principle of the maxim *secundum allegata et probata* that the plaintiff could succeed only by what he had alleged and proved.

In Ramesh B. Desai and Others v. Bipin Vadilal Mehta and Others [(2006) 5 SCC 638], Court emphasized the necessity of making requisite plea of Order VI, Rule 4 stating: "22. Undoubtedly, Order 6 Rule 4 CPC requires that complete particulars of fraud shall be stated in the pleadings. The particulars of alleged fraud, which are required to be stated in the plaint, will depend upon the facts of each particular case and no abstract principle can be laid down in this regard."

THE PLEADINGS ARE FOUNDATION OF LITIGATION - SUFFICIENT ATTENTION IS TO BE PAID TO THE PLEADINGS AND DOCUMENTS BY THE JUDICIAL OFFICERS BEFORE DEALING WITH THE CASE

This Court in **Dalip Singh v. State of U.P. and Others (2010) 2 SCC 114** observed that truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. As stated in the preceding paragraphs, the pleadings are foundation of litigation but experience reveals that sufficient attention is not paid to the pleadings and documents by the judicial officers before dealing with the case. It is the bounden duty and obligation of the parties to investigate and satisfy themselves as

to the correctness and the authenticity of the matter pleaded..... The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands..... It is imperative that judges must have complete grip of the facts before they start dealing with the case. That would avoid unnecessary delay in disposal of the cases. Ensuring discovery and production of documents and a proper admission/denial is imperative for deciding civil cases in a proper perspective. In relevant cases, the Courts should encourage interrogatories to be administered. If issues are properly framed, the controversy in the case can be clearly focused and documents can be properly appreciated in that light. The relevant evidence can also be carefully examined. Careful framing of issues also helps in proper examination and cross-examination of witnesses and final arguments in the case. The appellant is also guilty of introducing untenable pleas. The plea of adverse possession which has no foundation or basis in the facts and circumstances of the case was introduced to gain undue benefit. The Court must be cautious in granting relief to a party guilty of deliberately introducing irrelevant and untenable pleas responsible for creating unnecessary confusion by introducing such documents and pleas. These factors must be taken into consideration while granting relief and/or imposing the

costs..... False averments of facts and untenable contentions are serious problems faced by our courts. The other problem is that litigants deliberately create confusion by introducing irrelevant and minimally relevant facts and documents. The court cannot reject such claims, defences and pleas at the first look. It may take quite sometime, at times years, before the court is able to see through, discern and reach to the truth. More often than not, they appear attractive at first blush and only on a deeper examination the irrelevance and hollowness of those pleadings and documents come to light. Our courts are usually short of time because of huge pendency of cases and at times the courts arrive at an erroneous conclusion because of false pleas, claims, defences and irrelevant facts. A litigant could deviate from the facts which are liable for all the conclusions. In the journey of discovering the truth, at times, this Court, on later stage, but once discovered, it is the duty of the Court to take appropriate remedial and preventive steps so that no one should derive benefits or advantages by abusing the process of law.

**THE COURT MUST EFFECTIVELY DISCOURAGE
FRAUDULENT AND DISHONEST LITIGANTS - PLEADINGS ARE
EXTREMELY IMPORTANT FOR ASCERTAINING THE TITLE
AND POSSESSION**

The court must effectively discourage fraudulent and dishonest litigants. A serious endeavour has been made as to how the present system can be improved to a large extent. In the case of **Maria Margarida Sequeria Fernandes and Others v. Erasmo Jack de Sequeria (Dead) through L.Rs. (2012) 3 SCALE 550** , this Court had laid stress on purity of pleadings in civil cases. We deem it appropriate to set out paras 61 to 79 of that judgment dealing with broad guidelines provided by the Court which are equally relevant in this case:-

“61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

62. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession on behalf of the owner.

63. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.

64. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts.

65. A suit can be filed by the title holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession.

66. A title suit for possession has two parts – first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.

67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession

and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

70. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive. a) who is or are the owner or owners of the property; b) title of the property; c) who is in possession of the title documents d) identity of the claimant or claimants to possession; e) the date of entry into possession; f) how he came into possession - whether he purchased the property or inherited or got the same in gift or by any other method; g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount; h) if taken on rent, license fee or lease - then insist on rent deed, license deed or lease deed; i) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants etc.; j) subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and k) basis of his claim that not to deliver possession but continue in possession.

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

73. Discovery and production of documents and answers to interrogatories, together with an approach of considering what in ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues.

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission.

75. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

76. In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is

claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence.

77.

78. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence.

79. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case.”

Reba Mitra and Ors. vs. Soumi Majumdar and Ors.:

MANU/WB/2579/2019 - Therefore, it can be said that principles that govern the obligations of a litigant while approaching the Court for redressal of any grievance and the consequences of abuse of the process of Court may be summarized to say-

(1) Courts have, over the centuries, found upon litigants who, with intent to deceive and mislead the Courts, initiated proceeding without full disclosure of facts and came to the Courts with un-clean hands, should be condemned with tough voice the practice to keep the Court in dark about the facts and law already settled for such litigants and the deprecation should be in such a manner that people at large must get a strong message that vague litigation and or fraudulent activities before the Court must get an answer with penal consequences.

(2) There should always be duty casts upon the litigants to approach the Court with clean hands is an absolute obligation.

(3) Litigants should not be allowed to make any attempt to pollute the fair atmosphere of Justice Dispensation System of the Country by adopting unfair means of suppressing material fact before the Court.

(4) In order to give fair justice to the litigating parties the Court must ensure that its process is not abused and in order to prevent abuse of the process of the Court, it would be justified even in insisting on furnishing of security that in case of serious abuse the Court would be duty bound to impose heavy costs.

WHEN DEFENDANT TRANSPOSED AS PLAINTIFF WRITTEN STATEMENT SHOULD BE READ AS PLAINT - PLEADINGS AS EXPLAINED BY SUPREME COURT

JUSTICE M Saldanha, JUSTICE M R Prasad of Karnataka High Court in case of **Veerabhadrappe And Anr. vs Smt. Gangamma And Anr. Reported in AIR 2003 Kant 348, 2004 (3) KarLJ 13** when a defendant gets transposed as one of the plaintiffs, the written statement filed by such defendant gets transposed and would form part of the plaint. The necessity of amendment of a plaint at that stage is only for convenience-sake. In other words, the original plaint and the written statement of the defendant No. 2 who had got transposed as a plaintiff will have to be read together. In other words, such a written statement would partake the nature of plaint and the Courts of law administering justice in an adversary system of administration of justice cannot afford to take any other view and should read the said written

statement as a plaint. At this stage, it is necessary to refer to a decision of the apex Court, relied upon by the learned counsel for plaintiffs, reported in AIR 1987 1242, wherein the Supreme Court has held that the object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial, it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. The Supreme Court has further held that it is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleadings is raised the enquiry should not be so much about the form of pleadings, instead the COURT must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. On careful perusal of the said written statement, there has been a specific mention that the second plaintiff and her mother first plaintiff succeeded to the estate of deceased Smt. Shivalingamma and in fact, there had been a specific prayer for joint declaration of title in respect of 'B' schedule properties in favour of both the plaintiffs.

GUIDELINES ON MODE OF PLEADINGS AND DOCUMENTS TO BE PRODUCED FOR CLAIMING POSSESSION RE-STRESSED 2012 SC

JUSTICE Dalveer Bhandari, & JUSTICE Dipak Misra of Supreme court of India in the case of **A.Shanmugam vs Ariya, Decided on 27 April 2012**, has held that This case demonstrates widely prevalent state of affairs where litigants raise disputes and cause litigation and then obstruct the progress of the case only because they stand to gain by doing so. It is a matter of common experience that the Court's otherwise scarce resources are spent in dealing with non-deserving cases and unfortunately those who were waiting in the queue for justice in genuine cases usually suffer. This case is a typical example of delayed administration of civil justice in our Courts. A small suit, where the appellant was directed to be evicted from the premises in 1994, took 17 years before the matter was decided by the High Court. Unscrupulous litigants are encouraged to file frivolous cases to take undue advantage of the judicial system. The question often arises as to how we can solve this menace within the frame work of law. The court further observed that "We reiterate the immense importance and relevance of purity of pleadings. The pleadings need to be critically examined by the judicial officers or judges both before issuing the ad interim injunction and/or framing of issues. The entire journey of a judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. This Court in Dalip

Singh v. State of U.P. and Others (2010) 2 SCC 114 observed that truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. As stated in the preceding paragraphs, the pleadings are foundation of litigation but experience reveals that sufficient attention is not paid to the pleadings and documents by the judicial officers before dealing with the case. It is the bounden duty and obligation of the parties to investigate and satisfy themselves as to the correctness and the authenticity of the matter pleaded..... The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands..... It is imperative that judges must have complete grip of the facts before they start dealing with the case. That would avoid unnecessary delay in disposal of the cases. Ensuring discovery and production of documents and a proper admission/denial is imperative for deciding civil cases in a proper perspective. In relevant cases, the Courts should encourage interrogatories to be administered. If issues are properly framed, the controversy in the case can be clearly focused and documents can be properly appreciated in that light. The relevant evidence can also be

carefully examined. Careful framing of issues also helps in proper examination and cross-examination of witnesses and final arguments in the case. The appellant is also guilty of introducing untenable pleas. The plea of adverse possession which has no foundation or basis in the facts and circumstances of the case was introduced to gain undue benefit. The Court must be cautious in granting relief to a party guilty of deliberately introducing irrelevant and untenable pleas responsible for creating unnecessary confusion by introducing such documents and pleas. These factors must be taken into consideration while granting relief and/or imposing the costs..... False averments of facts and untenable contentions are serious problems faced by our courts. The other problem is that litigants deliberately create confusion by introducing irrelevant and minimally relevant facts and documents. The court cannot reject such claims, defences and pleas at the first look. It may take quite sometime, at times years, before the court is able to see through, discern and reach to the truth. More often than not, they appear attractive at first blush and only on a deeper examination the irrelevance and hollowness of those pleadings and documents come to light. Our courts are usually short of time because of huge pendency of cases and at times the courts arrive at an erroneous conclusion because of false pleas, claims, defences and irrelevant facts. A litigant could deviate from the facts which are liable for all the conclusions. In the journey of discovering the truth, at times, this Court, on later stage, but once discovered, it is the duty of the Court to take appropriate remedial and preventive steps so that no one should

derive benefits or advantages by abusing the process of law. The court must effectively discourage fraudulent and dishonest litigants.

A serious endeavour has been made as to how the present system can be improved to a large extent. In the case of **Maria Margarida Sequeria Fernandes and Others v. Erasmo Jack de Sequeria (Dead) through L.Rs. (2012) 3 SCALE 550**, Court had laid stress on purity of pleadings in civil cases. We deem it appropriate to set out paras 61 to 79 of that judgment dealing with broad guidelines provided by the Court which are equally relevant in this case:-

“61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

62. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession on behalf of the owner.

63. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.

64. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is

one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts.

65. A suit can be filed by the title holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession.

66. A title suit for possession has two parts – first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.

67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

70. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive.

- a) who is or are the owner or owners of the property;
- b) title of the property;
- c) who is in possession of the title documents
- d) identity of the claimant or claimants to possession;
- e) the date of entry into possession;
- f) how he came into possession - whether he purchased the property or inherited or got the same in gift or by any other method;
- g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount;

- h) if taken on rent, license fee or lease - then insist on rent deed, license deed or lease deed;
- i) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants etc.;
- j) subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and
- k) basis of his claim that not to deliver possession but continue in possession.

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

73. Discovery and production of documents and answers to interrogatories, together with an approach of considering what in ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues.

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission.

75. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

76. In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence.

77. XXXX XXXX XXXX

78. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence.

79. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case.”

PLEADINGS OF PARTIES AND THEIR EVIDENCE

JUSTICE Sunil Kumar Garg, of Rajasthan High court in the case of **Devi Shankar vs Ugam Raj - AIR 2002 Raj 330**, has discussed in great detail about pleadings "It may be stated here

that facts are of two kinds, *facta probanda* and *facta probantia*. Facts on which the party pleading relies for his claim or defence are called *facta probanda*. And the facts by means of which they are to be proved are called *facta probantia*. The former are material facts, the latter evidence to prove the former. ... The rule of *secundum allegata et probata* is based mainly on the principle that no party should be taken by surprise by the change of case introduced by the opposite party. Therefore, the test, when an objection of this kind is taken, is to see whether the party aggrieved has really been taken by surprise, or is prejudiced by the action of the opposite party. In applying this test the whole of the circumstances must be taken into account and carefully scrutinised to find out whether there has been such surprise or prejudice as will disentitle a party to relief. Every variance, therefore, between pleading and proof is not necessarily fatal to the suit or defence and the rule of *secundum allegata et probata* will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby. A variation which causes surprise and confusion is always looked upon with considerable disfavour. But, where a ground though not raised in the pleadings is expressly put in issue or where the new claim set up is not inconsistent with the allegations made in the pleadings and is based on facts alleged therein, there is no question of surprise to the opposite party. So also, where although there was no specific plea or specific issue on a particular question, the parties have gone to trial with the full knowledge that the question was in issue and adduced evidence, there can be no prejudice. Whether a plea has been raised may

be gathered from the pleadings taken as a whole, and if a sufficient plea is disclosed and the parties have led evidence on the point the Court can give relief on such plea."

Quoted citations of supreme court

In Firm Srinivas Ram Kumar v. Mahabir Prasad, AIR 1951 SC 177, the Hon'ble Supreme Court has held as under:- "A plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent acts of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made In the suit. there would be nothing Improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of ad- ducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit."

The Hon'ble Supreme Court in Trojan & Co. Ltd. v. Nagappa Chettiar, AIR 1953 SC 235 has held as under :- The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment in the plaint the Court held was not entitled to grant the relief not asked for.

In Bhagwati Prasad v. Chandramaul, AIR 1966 SC 735, the Hon'ble Supreme Court, after analysing the law laid down in the case of Trojan & Co. Ltd. v. Nagappa Chettiar (AIR 1953 SC 235), has further stated that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not disentitle a party from relying upon it if it is satisfactorily proved by evidence. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. But, if the parties led evidence knowing what they are going to allege and prove, then in such case general rule would not be applicable and the case would be covered by an issue by implication that though the matter has not been specifically pleaded, yet it is implied in the pleadings of the parties. In Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College, AIR 1987 SC 1242, the Hon'ble Supreme Court has held that it is not

desirable to place undue emphasise on form. Instead substance of pleadings should be considered.

The Hon'ble Supreme Court in Bhim Singh v. Ran Singh. AIR 1980 SC 727 has held that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactory proved by the evidence.

In Kali Prasad v. Bharat Coking Coal Ltd. AIR 1989 SC 1530, it has been held by the Hon'ble Supreme Court that where the parties went to trial knowing fully well what they were required to prove and they had adduced evidence of their choice in support of the respective claims and that evidence was considered by both courts below, they could not be allowed to turn round and say that the evidence should not be looked into.

In Jagdish Singh v. Natthu Singh, AIR 1992 SC 1604 it has been held by the Hon'ble Supreme Court that where the finding by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings.

In Kashibai v. Parwatibai (1995) 6 SCC 213 : (1995 AIR SCW 4631). it has been held by the Hon'ble Supreme Court that High Court cannot reappreciate the evidence and interfere with the concurrent findings of fact of courts below without even formulating any question of law. The High Court has no jurisdiction to entertain a second appeal on ground of erroneous findings of fact, based on appreciation of relevant evidence.

In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, AIR 1999 SC 2213, the Hon'ble Supreme Court has held that concurrent findings of fact, howsoever erroneous, cannot be disturbed by the High Court in exercise of powers under Section 100, C.P.C.

In Roop Singh v. Ram Singh, 2000 AIR SCW 1001 : (AIR 2000 SC 1485), it has been held by the Hon'ble Supreme Court that under Section 100 of the C. P. C., jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100, C. P. C.

The Hon'ble Supreme Court In **Om Prabha v. Abnash Chand, AIR 1968 SC 1083,** has observed that the ordinary rule of law is

that evidence should be given only on plea properly raised and not in contradiction of the plea.

CONCLUDED PRINCIPLES STATED BY COURT

(1) That the reason for the general rule that a party is bound by his pleadings is that if he is allowed to substantiate a case different from that pleaded, his opponent will be seriously prejudiced. But the Court may depart from the strict enforcement of the general rule, if it is satisfied that rigid compliance of the rule will lead to injustice.

(2) That where no prejudice was caused by the variation between the pleading and the proof to the opposite party, even no objection was raised about it when evidence was being led, such variance would not be fatal to defence of party who has made variation.

(3) That generally the parties should not be allowed to travel beyond their pleadings. However, pleadings should be construed liberally and the Court should not adopt a pedantic approach. If the substance of the essential material facts for grant of relief is stated in the pleading, the Court should not throw away the same on the ground of defective form or the deficiency in the pleading. Even if the plea is not raised in the pleading even then a claim of the party cannot be defeated, if the parties know the respective cases of each other on the said plea and led evidence in support of their cases.

(4) That if the alternative case is admitted by the defendant in his written statement and not only that, thereafter, both parties have led evidence, in such a situation, decree can be granted on such alternative case.

(5) That if the parties have led evidence considering the pleas taken either in pleadings or in, evidence, in such circumstances. it is not proper to say that such type of evidence should not be looked into.

(6) That if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved In the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence.

(7) That if the parties led evidence knowing what they are going to allege and prove, then in such case general rule would not be applicable and the case would be covered by an issue by implication that though the matter has not been specifically pleaded, yet it is implied in the pleadings of the parties, it is not desirable to place undue emphasis on form, instead substance of pleadings should be considered.

COURT CANNOT MAKE OUT A CASE NOT PLEADED BY PARTIES

It is well settled principles of law that a court cannot make out a case not pleaded by the parties. In other words, the court is required to find out the case pleaded by the parties. The court should confine its decision to the question raised in the pleading vide **(2008)17 Supreme Court Cases 491(Bachhaj Nahar vs. Nilima Mandal and another)**.

The principles laid down in Bhagwati Prasad [AIR 1966 SC 735] and Ram Sarup Gupta [(1987) 2 SCC 555 : AIR 1987 SC 1242] referred to above and several other decisions of this Court following the same cannot be construed as diluting the well-settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu.

WHEN THE RIGHT TO SUE ACCRUES

Mst. Rukhmabai v. Lala Laxminarayan and others 1960 AIR 335, 1960 SCR (2) 253 in which the Apex Court has held that the right to sue accrues when the defendant has clearly and

unequivocally threatened to infringe the right asserted by the plaintiff in the suit.

Union of India and others v. West Coast Paper Mills Ltd. and another 1971 AIR 349, 1971 SCR (2) 594 in which it has been held by the Apex Court that the period of limitation in terms of Article 58 of the Limitation Act is to be counted from the date when 'the right to sue first accrues'.

Ramti Devi (Smt.) v. Union of India 1995 SCC (1) 198, in which the Apex Court has held that for cancellation of registered deed the limitation is three years from the date of registration.

WHEN THERE IS NO SPECIFIC DENIAL IN PLEADINGS - COURT POWERS

JUSTICE SUBBARAO, K. JUSTICE DAYAL, RAGHUBAR JUSTICE MUDHOLKAR, J.R. of Supreme Court of India in the case of **Badat And Co vs East India Trading Co Reported in AIR 1964 SC 538, 1964 SCR (4) 19** "These three rules (O VIII R 3, 4, 5) form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written-statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be

taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do 'Justice between those parties, for which Courts are intended, the rigor of r. 5 has been modified by the introduction of the proviso thereto. Under that proviso the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably relying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice."

CAUSE OF ACTION EXPLAINED BY SUPREME COURT CASE LAWS

In STATE OF RAJASTHAN & OTHERS VS. M/S.SWAIKA PROPERTIES & ANOTHER ((1985) 3 SCC 217), the Supreme Court held that 'cause of action' is the bundle of facts which gives the plaintiff a right to relief against the defendant; and mere service of notice at the registered office of a Company does not give rise to a cause of action within that territory unless service of such notice was an integral part of the cause of action.

In SOUTH-EAST ASIA SHIPPING CO.LTD. VS. NAV BHARAT ENTERPRISES PVT.LTD. & OTHERS, ((1996) 3 SCC 443) Supreme Court reiterated that primacy has to be given to the

place where the cause of action has in fact arisen. Cause of action must include some act done by the defendant which gives the plaintiff the right to claim relief. In that case the respondents had filed a suit on the original side of the Delhi High Court for perpetual injunction against the appellant restraining him from enforcing a bank guarantee executed at Delhi and transmitted for performance to Bombay. The admitted position was that the contract was executed at Bombay and performance of the contract was also to be carried out in Bombay. In an appeal by Special Leave, the Supreme Court relying upon a judgment in *ABC Laminart v. A.P. Agencies*, ((1989) 2 SCC 163) held as follows: “ It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. In view of the admitted position that contract was executed in Bombay, i.e., within the jurisdiction of the High Court of Bombay, performance of the contract was also to be done within the jurisdiction of the Bombay High Court; merely because bank guarantee was executed at Delhi and transmitted for performance to Bombay, it does not constitute a cause of action to give rise to the respondent to lay the suit on the original side of the Delhi High Court. The contention that the

Division Bench was right in its finding and that since the bank guarantee was executed and liability was enforced from the bank at Delhi, the Court got jurisdiction, cannot be sustained.”

In RAJASTHAN HIGH COURT ADVOCATES' ASSOCIATION V. UNION OF INDIA AND OTHERS, ((2001) 2 SCC 294), the Apex Court emphasised that it was the infraction of the right of “cause of action” determines the place where the “cause of action” arise. The following observations of the Supreme Court are relevant: “The expression “cause of action” has acquired a judicially-settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the Judgment of the Court. Every fact which is necessary to be proved, as distinguished from every piece of evidence which is necessary to prove each fact, comprises in “cause of action”. It has to be left to be determined in each individual case as to where the cause of action arises.

In UNION OF INDIA AND OTHERS VS. ADNANI EXPORTS LTD., AND ANOTHER ((2002) 1 SCC 567), while explaining the principle that registered office of a company within the territorial jurisdiction of the Court would not ipso facto give a cause of

action to that Court, the Supreme Court reiterated the principle that the entire case pleaded would determine the cause of action and not merely the happening of inconsequential event that would determine the cause of action. In Para No.17, Apex Court observed as follows; “17. It is seen from the above that in order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower to court to decide a dispute which has, at least in-part, arisen within its jurisdiction. It is clear for the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned.”

PROOF WITHOUT PLEADINGS CANNOT BE LOOKED INTO

No amount of evidence can be looked into upon a plea which was never put forward - Honourable Supreme Court **Bhagat Singh and others v. Jaswant Singh, AIR 1966 SUPREME COURT 1861 .**

PLAINTIFF SHALL CLAIM ALL RELIEFS EMANATING FROM THE SAME CAUSE OF ACTION

Supreme Court in **Kunjan Nair Sivaraman Nair v. Narayanan Nair reported in (2004) 3 SCC 277** for the purpose of pressing into service Order 2 Rule 2. In that case, it was held that the doctrine of res judicata differs from the principle underlying Order 2 Rule 2. In the former case, its emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim, whereas in the latter, it requires the plaintiff to claim all reliefs emanating from the same cause of action.

Pramod Kumar and Ors. vs. Zalak Singh and Ors.: MANU/SC/0747/2019 - Order II Rule 2(1) of CPC provides that, a Plaintiff is to include the whole of the claim, which he is entitled to make, in respect of the cause of action. However, it is open to him to relinquish any portion of the claim. Order II Rule 2 of CPC provides for the consequences of relinquishment of a part of a claim and also the consequences of omitting a part of the claim. It declares that if a Plaintiff omits to sue or relinquishes intentionally any portion of his claim, he shall be barred from suing on that portion so omitted or relinquished. Order II Rule 2(3) of CPC, however, deals with the effect of omission to sue for all or any of the reliefs in respect of the same cause of action. The consequences of such omission will be to preclude Plaintiff from suing for any relief which is so omitted. The only exception is when he obtains leave of the Court.

However, it is true that the embargo in Order II Rule 2 of CPC will arise only if the claim, which is omitted or relinquished and the reliefs which are omitted and not claimed, arise from one cause of action. If there is more than one cause of action, Order II Rule 2 of CPC will not apply. Order II Rule 2 of CPC manifests a technical Rule as it has the effect of posing an obstacle in the path of a litigant ventilating his grievance in the Courts. There is an equally important principle that no person shall be vexed twice on the same cause of action

Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd. MANU/SC/0731/2012 : (2013) 1 SCC 625,. This Court, inter alia, has held as follows: Order 2 Rule 1 Code of Civil Procedure requires every suit to include the whole of the claim to which the Plaintiff is entitled in respect of any particular cause of action. However, the Plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 Code of Civil Procedure contemplates a situation where a Plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the Plaintiff so acts, Order 2 Rule 2 makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. Leave of the Court is contemplated by Order 2 Rule 2(3) in situations where a Plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the Plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the court had been obtained. It is clear from a conjoint

reading of the provisions of Order 2 Rules 2(2) and (3) that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, namely, where a Plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the Plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the Plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit provided that at the time of omission to claim the particular relief he had obtained leave of the court in the first suit. The object behind the enactment of Order 2 Rules 2(2) and (3) Code of Civil Procedure is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the Defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a Plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons.

Hon'ble Supreme Court in the case of **Firm Sreenivas Ram Kumar v. Mahabir Prasad and others**, [MANU/SC/0021/1951 : AIR (38) 1951 Supreme Court 177], which reads as under:- "A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule

undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit."

PLAINTIFF TO WIN ON HIS OWN STRENGTH AND NOT ON WEAKNESS OF DEFENDANT

Sayed Muhammed Mashur Kunhi Koya Thangal v. Badagara Jamayath Palli Dharas Committee and others, AIR 2004 SC 4365, by the Apex Court as under: "8..... The Plaintiff could only

succeed on the strength of its case and not on the weakness found in the case of the Defendant, if any"

Remco Industries Workers House Building Co-Op. Society v. Lakshmeesha M and Ors. 2003 SAR (Civil) 804 wherein it is held that identity of land in suit -burden lies on the plaintiff to establish - failure of defendants to raise clear and specific pleading in W.S to base their claim for title and possession of suit land on strength of certain documents - effect of - plaintiff has to succeed on strength of its own case and not on the weakness of the case of the defendant.

CONSUMER PROTECTION ACT – LIMITATION TO TAKE COMPLAINT- CAUSE OF ACTION EXPLAINED BY SUPREME COURT:-

KANDIMALLA RAGHAVAIAH & CO. VS NATIONAL INSURANCE CO. & ANR. JUSTICE D.K. JAIN, JUSTICE R.M. LODHA Consumer Protection Act, 1986 - Section 24-A of the Act bars any fora set up under the Act, from admitting a complaint, unless the complaint is filed within two years from the date on which the cause of action has arisen. The provision expressly casts a duty on the Commission, admitting a complaint, to dismiss a complaint unless the complainant satisfies the District Forum, the State Commission or National Commission, as the case may be, that the complainant had sufficient cause for not filing the complaint within the period of

two years from the date on which the cause of action had arisen. The term "cause of action" is neither defined in the Act nor in the Code of Civil Procedure, 1908 but is of wide import. It has different meanings in different contexts, that is when used in the context of territorial jurisdiction or limitation or the accrual of right to sue. Generally, it is described as "bundle of facts", which if proved or admitted entitle the plaintiff to the relief prayed for. Pithily stated, "cause of action" means the cause of action for which the suit is brought. "Cause of action" is cause of action which gives occasion for and forms the foundation of the suit. In the context of limitation with reference to a fire insurance policy, undoubtedly, the date of accrual of cause of action has to be the date on which the fire breaks out.

T.L. Nagendra Babu vs Manohar Rao Pawar ILR 2005 KAR 884 Pleadings should be verified by the party who is acquainted with the facts of the case - A party must also specify the number of paragraphs and his knowledge, information and belief with regard to the paragraphs - Verification must be signed by the concerned party by mentioning the date and place.

Apex Court in HEERALAL vs. KAYALAN MAL AND OTHERS (AIR 1998 SC 618), wherein it was held that once the written statement contains an admission in favour of the plaintiff, the amendment of such admission of the defendants cannot be allowed to be withdrawn and such withdrawal would amount to

totally displacing the case of the plaintiff which would cause him irretrievable prejudice.

In another decision of the Supreme Court in **B.K. NARAYANA PILLAI vs. PARAMESHWARAN PILLAI AND ANOTHER (2000 (1) SCC 712)** it was held that though the defendant has a right to take alternative pleas in defence by way of amendment, it would be subject to qualifications which are (1) proposed amendment should not result in injustice to the other side and (2) any admission made in favour of the plaintiff should not be withdrawn and (3) inconsistent and contradictory allegations which negate admitted facts should not be raised.

COMPLIANCE WITH ANY PROCEDURAL REQUIREMENT RELATING TO A PLEADING, MEMORANDUM OF APPEAL OR APPLICATION OR PETITION

UDAY SHANKAR TRIYAR V. RAM KALEWAR PRASAD SINGH AIR 2006 SC 269. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :- i) where the Statute prescribing the

procedure, also prescribes specifically the consequence of non-compliance.

ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

iii) where the non-compliance or violation is proved to be deliberate or mischievous;

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant;

JUDICIAL NOTICE OF THE FOLLOWING DEFECTS ROUTINELY FOUND IN VAKALATNAMAS FILED IN COURTS

UDAY SHANKAR TRIYAR V. RAM KALEWAR PRASAD SINGH AIR 2006 SC 269. Vakalatnama, a species of Power of Attorney, is an important document, which enables and authorizes the pleader appearing for a litigant to do several acts as an Agent, which are binding on the litigant who is the principal. It is a document which creates the special relationship between the lawyer and the client. It regulates and governs the extent of delegation of authority to the pleader and the terms and conditions governing such delegation. It should, therefore, be properly filled/attested/accepted with care and caution. Obtaining the signature of the litigant on blank Vakalatnamas and filling them subsequently should be avoided. We may take

judicial notice of the following defects routinely found in Vakalatnamas filed in courts :-

- (a) Failure to mention the name/s of the person/s executing the Vakalatnama, and leaving the relevant column blank;
- (b) Failure to disclose the name, designation or authority of the person executing the Vakalatnama on behalf of the grantor (where the Vakalatnama is signed on behalf of a company, society or body) by either affixing a seal or by mentioning the name and designation below the signature of the executant (and failure to annex a copy of such authority with the Vakalatnama).
- (c) Failure on the part of the pleader in whose favour the Vakalatnama is executed, to sign it in token of its acceptance.
- (d) Failure to identify the person executing the Vakalatnama or failure to certify that the pleader has satisfied himself about the due execution of the Vakalatnama.
- (e) Failure to mention the address of the pleader for purpose of service (in particular in cases of outstation counsel).
- (f) Where the Vakalatnama is executed by someone for self and on behalf of someone else, failure to mention the fact that it is being so executed. For example, when a father and the minor children are parties, invariably there is a single signature of the father alone in the Vakalatnama without any endorsement/statement that the signature is for 'self and as guardian of his minor children'. Similarly, where a firm and its partner, or a company and its Director, or a Trust and its trustee, or an organisation and its office-bearer, execute a Vakalatnama, invariably there will be only one signature without even an endorsement that the signature is both in his/her personal

capacity and as the person authorized to sign on behalf of the corporate body/firm/ society/organisation.

(g) Where the Vakalatnama is executed by a power-of- attorney holder of a party, failure to disclose that it is being executed by an Attorney-holder and failure to annex a copy of the power of attorney;

(h) Where several persons sign a single vakalatnama, failure to affix the signatures seriatim, without mentioning their serial numbers or names in brackets. (Many a time it is not possible to know who have signed the Vakalatnama where the signatures are illegible scrawls);

(i) Pleaders engaged by a client, in turn, executing vakalatnamas in favour of other pleaders for appearing in the same matter or for filing an appeal or revision. (It is not uncommon in some areas for mofussil lawyers to obtain signature of a litigant on a vakalatnama and come to the seat of the High Court, and engage a pleader for appearance in a higher court and execute a Vakalatnama in favour of such pleader).

We have referred to the above routine defects, as Registries/ Offices do not verify the Vakalatnamas with the care and caution they deserve. Such failure many a time leads to avoidable complications at later stages, as in the present case. The need to issue appropriate instructions to the Registries/Offices to properly check and verify the Vakalatnamas filed requires emphasis. Be that as it may.

OBJECT OF A PLEADING IS TO BRING THE PARTIES TO A TRIAL BY CONCENTRATING THEIR ATTENTION ON THE MATTER IN DISPUTE

In Ladly Prasad v. Karnal Distillery Co. , 1963 AIR 1279, 1964 SCR (1) 270 it is laid down that the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their case. A vague or general plea cannot serve this purpose; the party pleading must therefore be required to plead the precise nature of fraud, the manner of use, and the unfair advantage obtained. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise.

WHEN THE FORMAL REQUIREMENT OF PLEADINGS CAN BE RELAXED

Bhagwati Prasad vs Shri Chandramaul AIR 1966 SC 735, 1966 2 SCR 286 The importance of the pleadings cannot, of course, be ignored, because it is the pleading that lead to the framing of issues and a trial in every civil case has inevitably to be confined to the issues framed in the suit. The whole object of framing the issues would be defeated if parties allowed to travel beyond them and claim or oppose reliefs on grounds not made in the pleadings and not covered by the issues. But cases may occur in which though a particular plea is not specifically

included in the issues, parties might know that in substance, the said plea is being tried and might lead evidence about it. It is only in such a case where the Court is satisfied that the ground on which reliance is placed by one or the other of the parties, was in substance, at issue between them and that both of them have had opportunity to lead evidence about it at the trial and the formal requirement of pleadings can be relaxed.

PLEADING AS TO RIGHT OF EASEMENT IN SPECIFIC TERMS

Bachhaj Nahar vs Nilima Mandal & Ors. 2008 (15) SCALE 158

Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit).

He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

UNLESS SPECIFIC PLEA IS RAISED AND AN ISSUE IS FRAMED AND TRIED, IT IS NOT POSSIBLE FOR THE PARTIES TO KNOW THE CASE OF BLENDING

Division Bench Court in the case of **Gopal Purushotham Bichu (ILR 1989 Kant 169)** held that a new business started by the kartha or manager of a joint family is not considered to be the business of a joint family, unless it is started or carried on with the express or implied consent of adult coparceners or it is

proved that the joint family funds are utilised for the business to the advantage of the joint family.

This plea was not raised in the plaint. There was no issue in this regard. Blending or treating the new business as a joint family business is a question of fact depending upon the intention and conduct of the parties. Unless specific plea is raised and an issue is framed and tried, it is not possible for the parties to know the case of blending. No doubt in a case where the issue is raised without a proper plea, it may be presumed that the parties were aware of the plea involved and had adduced the evidence even in the absence of a plea, therefore, such a contention could be allowed. Such is not the case here. In the instant case, there is neither a plea nor an issue is raised and tried. However, during the course of arguments, it was raised in the trial Court. The trial Court has not accepted this plea. In the absence of the plea and the issue raised in this regard and tried by the trial Court, in our considered view, it is neither just and proper, nor permissible in law, to allow the plaintiff-appellant to canvass this contention in the appeal.

THE HONBLE JUSTICE K.S. Radhakrishnan, & THE HONBLE JUSTICE Dipak Misra in the case of **M/S Gian Chand & Brothers vs Rattan Lal @ Rattan Singh Decided on 8 January, 2013 - Reported in 2013 (2) SCC 606, 2013 (1) JT 314** - The said aspect can be looked from another angle. Rules 3, 4 and 5 of Order VIII form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. It is

obligatory on the part of the defendant to specifically deal with each allegation in the plaint and when the defendant denies any such fact, he must not do so evasively but answer the point of substance. It is clearly postulated therein that it shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiffs but he must be specific with each allegation of fact. Rule 4 stipulates that a defendant must not evasively answer the point of substance. It is alleged that if he receives a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received, and that if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances. Rule 5 deals with specific denial and clearly lays down that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted against him.We have referred to the aforesaid Rules of pleading only to highlight that in the written statement, there was absolutely evasive denial. We are not proceeding to state whether there was admission or not, but where there is total evasive denial and an attempt has been made to make out a case in adducing the evidence that he was not aware whether the signatures were taken or not, it is not permissible.

**LITIGANTS MUST OBSERVE TOTAL CLARITY AND CANDOUR
IN THEIR PLEADINGS 2011 SC**

Amar Singh vs Union Of India & Ors. 2011 (6) SCR 403 = 2011 (7) SCC 69 It is one of the fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings and especially when it contains a prayer for injunction. A prayer for injunction, which is an equitable remedy, must be governed by principles of 'uberrima fide' The aforesaid requirement of coming to Court with clean hands has been repeatedly reiterated by this Court in a large number of cases. Some of which may be noted, they are: Hari Narain v. Badri Das - AIR 1963 SC 1558, Welcome Hotel and others v. State of A.P. and others - (1983) 4 SCC 575, G. Narayanaswamy Reddy (Dead) by LRs. and another v. Government of Karnataka and another - JT 1991(3) SC 40, (1991) 3 SCC 261, S.P. Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs. and others - JT 1993 (6) SC 331: (1994) 1 SCC 1, A.V. Papayya Sastry and others v. Government of A.P. and others - JT 2007 (4) SC 186: (2007) 4 SCC 221, Prestige Lights Limited v. SBI - JT 2007(10) SC 218: (2007) 8 SCC 449, Sunil Poddar and others v. Union Bank of India - JT 2008(1) SC 308: (2008) 2 SCC 326, K.D.Sharma v. SAIL and others - JT 2008 (8) SC 57: (2008) 12 SCC 481, G. Jayashree and others v. Bhagwandas S. Patel and others - JT 2009(2) SC 71 : (2009) 3 SCC 141, Dalip Singh v. State of U.P. and others - JT 2009 (15) SC 201: (2010) 2 SCC 114.

Dalip Singh v. State of U.P. and others - JT 2009 (15) SC 201: (2010) 2 SCC 114.

For many centuries Indian society cherished two basic values of life i.e. satya (truth) and ahimsa (non-violence), Mahavir, Gautam Budha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre- independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

Remco Inds. Workers House Bldg. ... vs Lakshmeesha M. And Ors. AIR 2003 SC 3167 wherein it is held that identity of land in suit -burden lies on the plaintiff to establish - failure of defendants to raise clear and specific pleading in W.S to base

their claim for title and possession of suit land on strength of certain documents - effect of - plaintiff has to succeed on strength of its own case and not on the weakness of the case of the defendant.

Indira vs Arumugam And Anr. AIR 1999 SC 1549, ILR 1998 KAR 1, when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited.

IT IS THE BOUNDEN DUTY OF THE TRIAL COURT TO ASCERTAIN THE MATERIALS FOR CAUSE OF ACTION

The Supreme Court in the case of **Church of Christ Charitable Trust & Educational Charitable Society v. Ponniyamman Educational Trust: (2012) 8 SCC 706** has held as under:- "12.It is clear that if the allegations are vexatious and meritless and not disclosing a clear right or material(s) to sue, it is the duty of the trial Judge to exercise his power under Order 7 Rule 11. If clever drafting has created the illusion of a cause of action as observed by Krishna Iyer, J. in the abovereferred decision, it should be nipped in the bud at the first hearing by examining the parties under Order 10 of the Code. 13. While scrutinising the plaint averments, it is the bounden duty of the trial court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to

get a decree should be set out in clear terms..... A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue.."

I.T.C. Ltd. v. Debts Recovery Appellate Tribunal (1998) 2 SCC 70, wherein the Supreme Court has held as under:- "16. The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 CPC. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint."

INCONSISTENT PLEAS CAN BE RAISED BY DEFENDANTS IN THE WRITTEN STATEMENT ALTHOUGH THE SAME MAY NOT BE PERMISSIBLE IN THE CASE OF PLAINT 2006 SC

Baldev Singh & Ors vs. Manohar Singh and Anr., as reported in AIR 2006 SC 2832 "we are therefore of the view that inconsistent pleas can be raised by defendants in the written statement although the same may not be permissible in the case of plaint. In the case of M/s. Modi Spinning and Weaving Mills Co.Ltd. & Anr. Vs. M/s. Ladha Ram & Co. [(1976) 4 SCC 320], this principle has been enunciated by this Court in which it has been clearly laid down that inconsistent or alternative pleas can be made in the written statement."

EVEN WRITTEN STATEMENT NOT FILED ONE CAN CROSS EXAMINE AND GIVE EVIDENCE:-

Justice A.S.Bopanna of Karnataka High Court in the case of Mahadev S/O. Dadu Sadale vs Shankar S/O. Maruti Sadale Decided on 12 October, 2012 observed :- Even assuming for a moment that the appellant had not filed the written statement nothing had precluded to cross examination the plaintiff by the counsel and thereafter the evidence in any event could have been tendered by the defendant. It would not be open for him to contend that the Advocate had not informed, since having known that the suit had been filed against him, it was his duty to find out with regard to the stage of the suit and the ultimate decision if any in the suit. Be that as it may, even the explanation that the appellant came to know about the suit being decreed only when the execution petition had been filed and thereafter he has taken immediate steps also cannot be accepted.

FALSE REPRESENTATION EVEN WITHOUT BAD MOTIVE IS FRAUD

In Ram Chandra Singh vs. Savitri Devi and others, reported in (2003) 8 SCC 319, the Hon'ble Apex Court has held that it is a fraud in law if a party makes representations which he knows to be false and injury ensues therefrom although the motive from which the representations proceeded may not be bad.

THE CATEGORIES OF CONDUCT RENDERING A CLAIM FRIVOLOUS, VEXATIOUS OR AN ABUSE OF PROCESS ARE NOT CLOSED BUT DEPEND ON ALL THE RELEVANT CIRCUMSTANCES

Honourable Supreme Court, K.K. Modi v. K.N. Modi, 1998 A.I.R. S.C.W. 1166, their Lordships have discussed (in paras 42 and 43) what is meant by 'abuse of process of court'. They read thus: Under Order 6, Rule 6, the court may, at any stage of the proceeding, order to be struck out, inter alia, any matter in any pleading which is otherwise an abuse of the process of the court. Mulla in his treatise on the Code of Civil Procedure (15th Edition, Volume II, page 1179, note 7) has stated that power under Clause (c) of Order 6, Rule 16 of the Code is confined to cases where the abuse of the process of the court is manifest from the pleadings; and that this power is unlike the power under Section 151, where under courts have inherent power to strike out pleadings or to stay or dismiss proceedings which are an abuse of their process. In the present case the High Court has held the suit to be an abuse of the process of court on the basis of what is stated in the plaint. The Supreme Court Practice 1995 published by Sweet and Maxwell in paragraph 18/19/ 33 (page 344) explains the phrase "abuse of the process of Court thus: This terms connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material.

PRINCIPLES GOVERNING PRE-MATURE SUIT AND COURT POWERS 2012 SC

Justice P. Sathasivam, and Justice J. Chelameswar of Supreme Court of India in the case of M/S. Pushpa Sahkari Avas Samiti ... vs M/S. Gangotri Sahkari Avas Decided on 30 March, 2012. Quoted following case laws and re-framed principles governing pre-mature suit and court powers:-

In Vithalbhai Pvt. Ltd. v. Union of India, 2005 AIR SCW 1509 while dealing with the premature filing of a suit, a two-Judge Bench of Supreme Court, after referring to a number of decisions of various High Courts and Supreme Court, came to hold as follows:- The question of suit being premature does not go to the root of jurisdiction of the court; the court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and

unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors.

Bench ruled that the plea as regards the maintainability of the suit on the ground of its being premature should be promptly raised and it will be equally the responsibility of the Court to dispose of such a plea. Thereafter, it was observed as follows:- However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases:

- (i) when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event;
- (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose;
- (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and
- (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency.
- (v) One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained. (Samar Singh v. Kedar Nath AIR 1987 SC 1926)

WRITTEN STATEMENT AND ADDITIONAL WRITTEN STATEMENT – DELAY AND CHANGE IN STAND EXPLAINED BY SUPREME COURT

The Hon'ble Supreme court of India in Olympic Industries VS Mulla Hussainy Bhai Mulla Akberally & Ors. JUSTICE Tarun Chatterjee, JUSTICE H.L. Dattu, July 07, 2009. CODE OF CIVIL PROCEDURE, 1908: Or.8, r.9 - Subsequent pleadings - Additional written statement - Held: Even by filing an amendment or additional written statement, it is open to defendant to add a new ground of defence or to substitute or alter the defence or even to take inconsistent pleas in the written statement so long as the pleadings do not result in causing grave injuries/irretrievable prejudice to plaintiff - Mere delay is not sufficient to refuse amendment of pleadings or an additional written statement. Mere delay is not sufficient to refuse to allow amendment of pleadings or filing of additional written statement under Order 8 Rule 9 of the Code of Civil Procedure, 1908 where no prejudice was caused to the party opposing such amendment or acceptance of additional written statement which could easily be compensated by cost. That apart, the delay in filing the additional written statement has been properly explained by the appellant. Even if the examination of PW-1 or his cross-examination was over, then also, it was open to the court to accept the additional written statement filed by the appellant by awarding some cost against the appellant. Even by filing an amendment or additional written statement, it is open to the defendant to add a new ground of defence or substituting or

altering the defence or even taking inconsistent pleas in the written statement as long as the pleadings do not result in causing grave injustice and irretrievable prejudice to plaintiff or displacing him completely. It is well settled that courts should be more generous in allowing the amendment of written statement than in the case of plaint. While allowing additional written statement or refusing to accept the same, the court should only see that if such additional written statement is not accepted, the real controversy between the parties could not be decided. In the instant case, by filing additional written statement, no injustice/prejudice would be caused to the respondents, but that would help the court to decide the real controversy between the parties.

ORIGINAL PETITION AND A SUIT DISTINGUISHED 2012 SC

Justice K.S. Radhakrishnan, and Justice Dipak Misra of Supreme Court of India, in the case of Sinnamani & Anr. vs G. Vettivel & Ors. Decided on 9 May, 2012

A suit can be instituted by presentation of a plaint and Order IV and VII C.P.C. deals with the presentation of the plaint and the contents of the plaint. Chapter I of the Civil Rules of Practice deals with the form of a plaint. When the statutory provision clearly says as to how the suit has to be instituted, it can be instituted only in that manner alone, and no other manner. The Trust Act contains 9 chapters. Chapter 6 deals with the rights and liabilities of the beneficiaries, which would indicate that the beneficiaries of trust have been given various rights and those rights are enforceable

under the law. Section 59 of the Act confers a right upon the beneficiaries to sue for execution of the trust which would indicate that the beneficiaries may institute a suit for execution of the trust. Therefore, the above-mentioned provisions would show that in order to execute the trust, the right is only to file a suit and not any original petition. Under the Trust Act also for certain other purposes original petitions can be filed. Section 72 of the Trust Act provides for a trustee to apply to a principal civil court of original jurisdiction by way of petition to get himself discharged from his office. Similarly, Section 73 of the Act empowers the principal civil court of original jurisdiction to appoint new trustees. Few of the provisions of the Act permit for filing of original petitions. The above facts would clearly indicate that the Trust Act provides for filing of a suit then suit alone can be filed and when it provides for original petition then original petition alone can be filed and there is no question of conversion of original petition to that of a civil suit or vice-versa, especially in the absence of a statutory provision under the Trust Act. Certain legislations specifically provide for conversion of original petition into a suit. Section 295 of the Indian Succession Act is such a provision. The Trust Act, however, contains no such enabling provision to convert the original petition into a suit.

A similar question came up for consideration before this Court in *P.A. Ahmad Ibrahim v. Food Corporation of India* ((1999) 7 SCC 39) wherein, while interpreting Section 20 C.P.C. the Court held as follows: "Further, before applying the provisions of Order VI Rule 17, there must be institution of the suit. Any application filed under the provisions of different statutes cannot

be treated as a suit or plaint unless otherwise provided in the said Act. In any case, the amendment would introduce a totally new cause of action and change the nature of the suit. It would also introduce a totally different case which is inconsistent with the prayer made in the application for referring the dispute to the arbitrator. Prima facie, such amendment would cause serious prejudice to the contention of the appellant that the claim of the respondent to recover the alleged amount was barred by the period of limitation as it was pointed out that cause of action for recovery of the said amount arose in the year 1975 and the amendment application was filed on 30.3.1986. Lastly, it is to be stated that in such cases, there is no question of invoking the inherent jurisdiction of the Court under Section 151 of the C.P.C. as it would nullify the procedure prescribed under the Code.”

IN CIVIL DISPUTE CONDUCT OF PARTIES IS MATERIAL

Janki Vashdeo Bhojwani & Anr. Vs Indusind Bank Ltd. & Ors. AIR 2005 SC 439, In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of Decree.

FOR REDRESSAL OF INDIVIDUAL GREVANCES – APPROACH ONLY CIVIL COURT

As per the ratio laid down by the Supreme Court in NAHAR INDUSTRIAL ENTERPRISES LTD. VS. HONG KONG AND

SHANGHAI BANKING CORPORATION, 2009 (4) CTC 74 = (2009) 8 SCC 646, recourse to other provisions of the Code will have to be made for redressal of individual grievance. For redressal of individual grievances, they have to approach only Civil Courts. When such Civil suits are filed, Courts are to be cautious about astute drafting of plaint. Courts have a duty to see that whether the plaint allegations are made by trying to bring Civil Suit within the parameters laid down by the Supreme Court in *Mardia Chemicals Ltd. vs. Union of India*, case (2004(2) CTC 759 (SC) and under the pretext of seeking redressal of individual grievance.

CLEAN HANDS OF LITIGANT

Whenever a person approaches a Court of Equity, in the exercise of its extraordinary jurisdiction, it is expected that he will approach the said court not only with clean hands but also with a clean mind, a clean heart and clean objectives. Thus, he who seeks equity must do equity. The legal maxim “*Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiores*”, means that it is a law of nature that one should not be enriched by causing loss or injury to another. (Vide: *The Ramjas Foundation & Ors. v. Union of India & Ors.*, AIR 1993 SC 852; *Nooruddin v. (Dr.) K.L. Anand*, (1995) 1 SCC 242; and *Ramniklal N. Bhutta & Anr. v. State of Maharashtra & Ors.*, AIR 1997 SC 1236).

In *Dalip Singh v. State of U.P. & Ors.*, (2010) 2 SCC 114, this Court noticed an altogether new creed of litigants, that is, dishonest litigants and went on to strongly deprecate their conduct by observing that, the truth constitutes an integral part of the justice delivery system. The quest for personal gain has become so intense that those involved in litigation do not hesitate to seek shelter of falsehood, misrepresentation and suppression of facts in the course of court proceedings. A litigant who attempts to pollute the stream of justice, or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

The truth should be the guiding star in the entire judicial process. “Every trial is a voyage of discovery in which truth is the quest”. An action at law is not a game of chess, therefore, a litigant cannot prevaricate and take inconsistent positions. It is one of those fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings. (Vide: *Ritesh Tewari & Anr. v. State of Uttar Pradesh & Ors.*, (2010) 10 SCC 677; and *Amar Singh v. Union of India*, (2011) 7 SCC 69).

In *Maria Margarida Sequeria Fernandes & Ors. v. Erasmo Jack de Sequeria (dead)*, (2012) 5 SCC 370), Court taking note of its earlier judgment in *Ramrameshwari Devi v. Nirmala Devi*, (2011) 8 SCC 249 held: “False claims and defences are really serious problems with real estate litigation, predominantly because of ever- escalating prices of the real estate. Litigation

pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our courts. If pragmatic approach is adopted, then this problem can be minimised to a large extent.”

In the case of Bhaurao Dagdu Paralkar Vs. State of Maharashtra and others reported in MANU/SC/0495/2005 : (2005) 7 Supreme Court Cases 605, the Hon'ble Apex Court was pleased to observe at paragraphs 9 to 11 as below:- "9. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. 10. A "Fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. 11. "Fraud" as is well known vitiates every solemn act. Fraud and justice

never dwell together. Fraud is a conduct either by letters or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letters. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."

In the case of Kishore Samrite Vs. State of Uttar Pradesh and others reported in MANU/SC/0892/2012 : (2013) 2 Supreme Court Cases 398, at paragraph 38, the Hon'ble Apex Court was pleased to observe as below:- "38. No litigant can play "hide and seek" with the Courts or adopt "pick and choose". True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot

hold a writ of the Court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty-bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of Court."

WHAT IS MATERIAL FACTS IN A PLEADING

Sopan Sukhdeo Sable & ors vs. Assistant Charity Commissioner - (2004) 3 SCC 137 There is distinction between 'material facts' and 'particulars'. The words 'material facts' show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad. Court in Samant N. Balkrishna v. George Fernandez (1969 (3) SCC 238), the distinction between "material facts" and "particulars" was brought out in the following terms: The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet.

PLEA OF UNDUE INFLUENCE TO BE SPECIFICALLY PLEADED

Ku. Sonia Bhatia v. State of U.P., AIR 1981 SC 1274 wherein it was held that absence of consideration in a gift is an essential element. In Afsar Sheikh v. Soleman Bibi, (1976) 2 SCC 142 : (AIR 1976 SC 163) it was held that plea of undue influence cannot be made out from the general allegations in the plaint if not specifically pleaded.

In Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib, AIR 1967 SC 878 it was held that no presumption of undue influence can arise merely because parties were nearly related to each other or merely because donor was an old or of weak character.

SCRUTINY OF PLEADINGS

In Madan Gopal v. Mamraj Maniram, AIR 1976 SC 461 it was held that Courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds.

In Manjushri v. B. L. Gupta, AIR 1977 SC 1158, it was laid down that pleadings have to be interpreted not with formalistic rigour but with latitude or awareness of low legal literacy of poor people.

In Harisb Chandra v. Triloki Singh, AIR 1957 SC 444, it was clarified that the substance of the case should be kept in view and not merely the words used in the pleadings.

In Udhav Singh v. M. R. Scindia, AIR 1976 SC 744 the Court emphasised that pleading must be read as a whole and Courts should not look merely to the form of pleading or pick out from it isolated words or sentences.

COURT CANNOT MAKE OUT A NEW CASE FOR A PARTY

Gobind Prasad Sinha .vs. Kulwanti and others reported in AIR1985 Patna 31 which reads as follows: "In the present case, the plaintiff as well as the contesting defendant both alleging independent right, title and interest over the disputed plot, it was not for the court of appeal below to make out a new case for the parties and to hold that the plaintiff and the contesting defendants were entitled to half and half and that they were in joint possession. The Court cannot make out a new case for a party. It is true that the courts are bound to take into consideration all the rights of the parties to the suit, both legal and equitable and give effect thereto by their decrees as far as possible but the courts are not at liberty to grant a relief either not sought for in the plaint or that does not naturally flow from the grounds of claim as stated in the plaint."

PROOF WITHOUT PLEADINGS NO USE

In RUDRAWWA vs. BALAWWA & Another reported in 1967 (1) Mys.LJ page 71, this Court has held, if the case is not pleaded any amount of evidence cannot fill the lacuna.

In Ram Sarup Gupta v. Bishun Narain Inter College [(1987) 2 SCC 555 : AIR 1987 SC 1242] Court held as under: (SCC p. 562, para 6) "6. ... in the absence of pleading, evidence, if any, produced by the parties cannot be considered. ... no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it."

In Kashi Nath v. Jaganath [(2003) 8 SCC 740] (SCC p. 745, para 17) Court held that where the evidence is not in line with the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon. Same remains the object for framing the issues under Order 14 CPC and the court should not decide a suit on a matter/point on which no issue has been framed. (Vide Biswanath Agarwalla v. Sabitri Bera [(2009) 15 SCC 693 : (2009) 5 SCC (Civ) 695] and Kalyan Singh Chouhan [(2011) 11 SCC 786 : (2011) 4 SCC (Civ) 656 : AIR 2011 SC 1127] .)

In Syed and Co. v. State of J&K [1995 Supp (4) SCC 422] this Court held as under: (SCC pp. 423-24, paras 7-8) "7. ... Without specific pleadings in that regard, evidence could not be led in since it is a settled principle of law that no amount of evidence can be looked unless there is a pleading."

In Chinta Lingam v. Govt. of India [(1970) 3 SCC 768 : AIR 1971 SC 474] Court held that unless factual foundation has been laid in the pleadings no argument is permissible to be raised on that particular point.

Anathula Sudhakar vs P. Buchi Reddy (Dead) By Lrs. And Ors. (2008) 4 SCC 594 wherein this Court held "no amount of evidence or arguments can be looked into or considered in the absence of pleadings and issues, is a proposition that is too well settled."

Court while dealing with an issue in Kalyan Singh Chouhan v. C.P. Joshi, AIR 2011 SC 1127, after placing reliance on a very large number of its earlier judgments including Messrs. Trojan & Co. v. RM.N.N. Nagappa Chettiar, AIR 1953 SC 235; Om Prakash Gupta v. Ranbir B. Goyal, AIR 2002 SC 665; Ishwar Dutt v. Land Acquisition Collector & Anr., AIR 2005 SC 3165; and State of Maharashtra v. M/s. Hindustan Construction Company Ltd., AIR 2010 SC 1299, held that relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in absence of the pleadings in that respect. No party can be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further held that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon.

NO SPECIFIC DENIAL IS TAKEN AS ADMITTED

Badat & Co. vs. East India Trading Company AIR 1964 SC 538 in the following words: These three rules form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary.

Apex Court in Om Prabha Jain vs. Abnash Chand AIR 1968 SC 1083 observed that the ordinary rule of law is that evidence is to be given only on a plea properly raised and not in contradiction of plea.

**NEW PLEA OF FACTUAL CONTROVERSY CANNOT BE RAISED
NEW PLEA OF LEGAL ISSUE CAN BE RAISED AT ANY TIME**

There is no quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings. [See *Sanghvi Reconditioners (P) Ltd. v. Union of India* [(2010) 2 SCC 733 : AIR 2010 SC 1089] and *Greater Mohali Area Development Authority*

v. Manju Jain [(2010) 9 SCC 157 : (2010) 3 SCC (Civ) 639 : AIR 2010 SC 3817] "

VARIATION IN PLEADING AND PROOF

The Hon'ble Supreme Court In Om Prabha v. Abnash Chand, AIR 1968 SC 1083, has observed that the ordinary rule of law is that evidence should be given only on plea properly raised and not in contradiction of the plea.

Devi Shankar vs Ugam Raj AIR 2002 Raj 330 The rule of *secundum allegata et probata* is based mainly on the principle that no party should be taken by surprise by the change of case introduced by the opposite party. Therefore, the test, when an objection of this kind is taken, is to see whether the party aggrieved has really been taken by surprise, or is prejudiced by the action of the opposite party. In applying this test the whole of the circumstances must be taken into account and carefully scrutinised to find out whether there has been such surprise or prejudice as will disentitle a party to relief. Every variance, therefore, between pleading and proof is not necessarily fatal to the suit or defence and the rule of *secundum allegata et probata* will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby. A variation which causes surprise and confusion is always looked upon with considerable disfavour. But, where a ground though not raised in the pleadings is expressly put in issue or where the new claim set up is not inconsistent with the allegations made in the

pleadings and is based on facts alleged therein, there is no question of surprise to the opposite party. So also. where although there was no specific plea or specific issue on a particular question, the parties have gone to trial with the full knowledge that the question was in issue and adduced evidence, there can be no prejudice. Whether a plea has been raised may be gathered from the pleadings taken as a whole, and if a sufficient plea is disclosed and the parties have led evidence on the point the Court can give relief on such plea.

In Firm Srinivas Ram Kumar v. Mahabir Prasad, AIR 1951 SC 177, the Hon'ble Supreme Court has held as under:-- "A plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent acts of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made In the suit. there would be nothing Improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such

circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit."

The Hon'ble Supreme Court in Trojan & Co. Ltd. v. Nagappa Chettiar, AIR 1953 SC 235 has held as under :-- The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment in the plaint the Court held was not entitled to grant the relief not asked for."

In Bhagwati Prasad v. Chandramaul, AIR 1966 SC 735, the Hon'ble Supreme Court, after analysing the law laid down in the case of Trojan & Co. Ltd. v. Nagappa Chettiar (supra), has further stated that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not disentitle a party from relying upon it if it is satisfactorily proved by evidence. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. But, if the parties led evidence knowing what they are going to allege and prove, then in such case general rule would not be applicable and the case would be covered by an issue by implication that

though the matter has not been specifically pleaded, yet it is implied in the pleadings of the parties

In Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College, AIR 1987 SC 1242, the Hon'ble Supreme Court has held that it is not desirable to place undue emphasise on form. Instead substance of pleadings should be considered.

The Hon'ble Supreme Court in Bhim Singh v. Ran Singh. AIR 1980 SC 727 has held that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactory proved by the evidence.

In Kali Prasad v. Bharat Coking Coal Ltd. AIR 1989 SC 1530, it has been held by the Hon'ble Supreme Court that where the parties went to trial knowing fully well what they were required to prove and they had adduced evidence of their choice in support of the respective claims and that evidence was considered by both courts below, they could not be allowed to turn round and say that the evidence should not be looked into.

Devi Shankar vs Ugam Raj AIR 2002 Raj 330

(1) That the reason for the general rule that a party is bound by his pleadings is that if he is allowed to substantiate a case

different from that pleaded, his opponent will be seriously prejudiced. But the Court may depart from the strict enforcement of the general rule, if it is satisfied that rigid compliance of the rule will lead to injustice.

(2) That where no prejudice was caused by the variation between the pleading and the proof to the opposite party, even no objection was raised about it when evidence was being led, such variance would not be fatal to defence of party who has made variation.

(3) That generally the parties should not be allowed to travel beyond their pleadings. However, pleadings should be construed liberally and the Court should not adopt a pedantic approach. If the substance of the essential material facts for grant of relief is stated in the pleading, the Court should not throw away the same on the ground of defective form or the deficiency in the pleading. Even if the plea is not raised in the pleading even then a claim of the party cannot be defeated, if the parties know the respective cases of each other on the said plea and led evidence in support of their cases.

(4) That if the alternative case is admitted by the defendant in his written statement and not only that, thereafter, both parties have led evidence, in such a situation, decree can be granted on such alternative case.

(5) That if the parties have led evidence considering the pleas taken either in pleadings or in, evidence, in such circumstances.

it is not proper to say that such type of evidence should not be looked into.

(6) That if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved In the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence.

(7) That if the parties led evidence knowing what they are going to allege and prove, then in such case general rule would not be applicable and the case would be covered by an issue by implication that though the matter has not been specifically pleaded, yet it is implied in the pleadings of the parties, it is not desirable to place undue emphasis on form, instead substance of pleadings should be considered.

PLEADED THAT SIGNATURE ON THE DOCUMENT IS FORGED, IT AMOUNTS DENIAL OF THE EXECUTION OF THE DOCUMENT

In Rosammal Issetheenammal Fernandez (Dead) by Lrs. And others Vs. Joosa Mariyan Fernandez and others, (2000) 7 SCC 189, the Apex Court has held that when in pleading it is

pleaded that signature on the document is forged, it amounts denial of the execution of the document. The denial cannot be more strong. Once there is a denial by a party it cannot be doubted that the proviso to section 68 of the Evidence Act will come into play. Paragraph-9 is the relevant which is reproduced below:- "The aforesaid pleading leaves no room of doubt about denial of execution of the said documents. The pleading records that Defendants 1 and 2 forged the signature of their father after influencing the Sub-Registrar. The denial cannot be more strong than what is recorded here. Once when there is denial made by the plaintiff, it cannot be doubted that the proviso will not be attracted. The main part of Section 68 of the Indian Evidence Act puts an obligation on the party tendering any document that unless at least one attesting witness has been called for proving such execution the same shall not be used in evidence."

IN THE ABSENCE OF RELEVANT PLEADINGS, THE COURT IS UNDER NO OBLIGATION TO ENTERTAIN THE PLEAS

Ram Narain Arora v. Asha Rani & Ors., (1999) 1 SCC 141

There cannot be a pedantic or a dogmatic approach in the matter of analysis of pleadings or of the evidence adduced thereto. It is no doubt true that if the pleadings are clearly set out, it would be easy for the Court to decide the matters. But if the pleadings are lacking or vague and if both parties have understood what was the case pleaded and put forth with reference to requirement of law and placed such material before the court, neither party is prejudiced. It is settled proposition of law that a party has to

plead the case and produce/adduce sufficient evidence to support his pleading made in the plaint or written statement and in the absence of relevant pleadings, the Court is under no obligation to entertain the pleas.

It is settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to support his pleading made in the plaint or written statement and in the absence of relevant pleadings, the Court is under no obligation to entertain the pleas. Reference in this regard may be had to the judgments of Hon'ble Supreme Court in **Larsen & Toubro Ltd. Vs. State of Gujarat, 1998 SCC 387; National Building Construction Corporation Vs. S. Raghunathan & Ors., (1998) 7 SCC 66; Ram Narain Arora v. Asha Rani & Ors., (1999) 1 SCC 141; Smt. Chitra Kumari Vs. Union of India & Ors., (2001) 3 SCC 208; State of U.P. Vs. Chandra Prakash Pandey, (2001) 4 SCC 78 and Rajasthan State Road Transport Corporation and another Vs. Bajrang Lal, (2014) 4 SCC 693.**

It is also well settled that any finding in the absence of necessary pleadings and supporting evidence can not be sustained in law. Reference in this regard may be had to the judgments of Hon'ble Supreme Court in **M/s. Atul Castings Ltd. v. Bawa Gurvachan Singh, (2001) 5 SCC 133 (para 12); Vithal N. Shetti & Anr. Vs. Prakash N. Rudrakar & Ors., (2003) 1 SCC 18; Devasahayam (Dead) by L.Rs. Vs. P. Savithramma & Ors., (2005) 7 SCC 653; Sait Nagjee Purushotam & Co. Ltd. Vs. Vimalabai Prabhulal & Ors., (2005) 8 SCC 252; Rajasthan Pradesh V.S. Sardarshahar**

& Anr. Vs. Union of India & Ors., (2010) 12 SCC 609 (para 17); Ritesh Tiwari & Anr. v. State of U.P. & Ors., (2010) 10 SCC 677 and Union of India v. Ibrahim Uddin & Anr. (2012) 8 SCC 148.

Bondar Singh and others Vs. Nihal Singh and others (2003) 4 SCC 161 (Para 7), Hon'ble Supreme Court held that when the plea of sub-tenancy was never taken in the written statement and the written statement is lacking in material particulars on this aspect, then as per settled law; in the absence of a plea no amount of evidence led in relation thereto can be looked into and the defendants cannot be allowed to build up a case of sub tenancy. Had the defendants taken such a plea it would have found place as an issue in the suit.

Janak Dulari Devi and Ors. vs. Kapildeo Rai and Ors.: MANU/SC/0553/2011 Civil Procedure Code, 1908 - Order 6, Rule 2 - When what is pleaded is not proved or what is stated in the evidence is contrary to the pleadings, the dictum that no amount of evidence contrary to the pleadings, howsoever cogent can be relied on would apply.

NECESSARY PLEADING AND PROOF TO ESTABLISH RIGHTS

Shri Ram Mandir, Indore vs. State of Madhya Pradesh and Ors.: MANU/SC/0287/2019 -2019 (4) SCALE 302 - In State of Uttarakhand and Anr. v. Mandir Sri Laxman Sidh Maharaj MANU/SC/1180/2017 : (2017) 9 SCC 579, it was held that "the

necessary material pleadings ought to have been made to show as to how and on what basis, the Plaintiff claimed his ownership over such a famous heritage temple and the land surrounding the temple. Thus, in the absence of any pleadings in the plaint that the pujari built the temple, they cannot claim the temple to be a private temple." In the case in hand, plaint lacks pleadings regarding who constructed the temple and how he raised the funds. The name of Gulab Das who allegedly constructed the temple is not mentioned in the plaint. No evidence was adduced by the Appellant to show as to how Gulab Das constructed the temple and whether personal funds were used by Gulab Das to establish the temple or whether there was contribution from the public. In his evidence, Bajrang Das (PW-1) has stated that the temple was constructed by Gulab Das. On the other hand, Bheru Lal (PW-2) has stated that the temple was constructed by Sewa Das and Gulab Das. In the absence of pleadings and evidence that the temple was constructed by Gulab Das, the First Appellate Court rightly held that based on the evidence of PW-1, it cannot be held that Shri Ram Mandir is a private temple. In *Goswami Shri Mahalaxmi Vahuji v. Ranchhoddas Kalidas and Ors.* MANU/SC/0466/1969 : (1969) 2 SCC 853, the Supreme Court held that "the origin of the temple, the manner in which its affairs are managed, the nature and extent of gifts received by it, rights exercised by the devotees in regard to worship therein, are relevant factors to establish whether a temple is a public temple or a private temple." Likewise, as held in *Tilkayat Shri Govindlalji Maharaj Etc. v. State of Rajasthan and Ors.* MANU/SC/0028/1963 : [1964] 1 SCR 561, the participation of

the members of the public in the Darshan in the temple and in the daily acts of worship or in the celebrations may be a very important factor to consider in determining the character of the temple.

ADVOCATE CANNOT SIGN PLEADINGS AND FILE VERIFYING AFFIDAVIT

Oil And Natural Gas Commission vs Offshore Enterprises Inc. AIR 1993 Bom 217,

(a) An Advocate is not entitled to act in a professional capacity as well as constituted attorney of a party in the same matter or cause. An Advocate cannot combine the two roles. If a firm of Advocates is appointed as Advocates by a Suitor, none of partners of the Advocates' firm can act as recognised agent in pursuance of a power of attorney concerning the same cause.

(b) The existing practice followed by the firm of advocates/solicitors/attorneys particularly in case of non-resident clients combining the two roles is opposed to law and is required to be discontinued forthwith.

(c) The Prothonotary and Senior Master, High Court shall not accept any vakalatnama in favour of a firm of advocates where one or the other partner of the same firm also holds a power of attorney from the plaintiff or the defendant or any other suitor before the Court in the same cause.

In the case of Raj Kumar Dhar v. Colonel A. Stuart Lewis, MANU/WB/0017/1958 : AIR 1958 Cal 104 , it has been held

that verifications of pleadings is an important matter which may have serious consequences. The object of verification is to fix responsibility of the party verifying and to prevent false pleadings being recklessly filed or false allegations being recklessly made. It must have some sanctity and for that purpose the rule makes provisions by insisting upon the competency of the person verifying where he is somebody other than the actual party concerned by requiring him to prove to the satisfaction of the court his acquaintance with the facts of the case. This is all the more imperative where the competency of the person verifying is challenged by the other side. It has further been held that where the plaint contains serious allegations of fraud against the defendants and the verification is sought to be made by an agent under a power of attorney by merely putting on record the power of attorney, it is wholly insufficient for the purpose, as the plaintiff's agent simpliciter holding an authority to sign the verification under the power of attorney would be incompetent to verify the plaint. It has further been held that in the circumstances the plaintiff should be required to verify the plaint himself so that he may accept full responsibility for it under the law.

BSN (UK) Ltd. and Ors. vs. Janardan Mohandas Rajan Pillai and Ors.: MANU/MH/0077/1993 - 1993 (3) BomCR 228 - Law prohibits an advocate from acting in dual capacity -provisions of Code of 1908 do not permit such combination.

IF PARTIES FAIL TO PROVE THEIR PLEAS THEY CANNOT BE PENALISED

Meenakshamma vs. Nanjundappa ILR 1992 KAR 3523 : MANU/KA/0450/1992 - Parties go to trial on the basis of their respective pleadings and the issues framed thereunder. Ultimately the facts found by the Court may be contrary to the facts pleaded by one of the contesting parties. In such a situation, the said party cannot be deprived of his or her rights, flowing out of the proved facts. Further the relief to be granted to the plaintiffs, here, will be, on the basis of their claim in the plaint to the effect that there has been no earlier partition. All consequences, flowing out of the basic case found by the Court shall have to be taken note of and effect ought to be given to such a finding. Second defendant has put forth a legal plea that there was a partition earlier by virtue of the will during the father's life-time. If this plea fails, she cannot be penalised by depriving her of her due share in the properties. She can seek her share at any time before the final decree is made.

FALSE AVERRMENTS, MISREPRESENTATION AND SUPPRESSION OF MATERIAL FACTS, AMOUNTS TO FRAUD ON COURT

Vice Chairman, Kendriya Vidyalaya Sangathan and Another v. Girdhari Lal Yadav, MANU/SC/ 1303/2004 : 2004 (6) SCC 325, Hon'ble Supreme Court considered the applicability of principles of natural justice in cases involving fraud and held in

as under: "12. Furthermore, the respondent herein has been found guilty of an act of fraud. In opinion, no further opportunity of hearing is necessary to be afforded to him. It is not necessary to dwell into the matter any further as recently in the case of Ram Chandra Singh v. Savitri devi this Court has noticed: "15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."

19. In Derry v. Peek, (1889)14 AC 337 it was held: "In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person who made it liable to an action of deceit."

Ram Chandra Singh v. Savitri Devi and others,
MANU/SC/0802/2003 : 2003(8) SCC 319, Hon'ble Supreme Court held as under:

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is wellknown vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

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18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.

37. It will bear repetition to state that any order obtained by practising fraud on court is also non-est in the eyes of law."

S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others, MANU/SC/0192/1994 : AIR 1994 SC 853, the Hon'ble Supreme Court held as under: "7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to

approach the court. He can be summarily thrown out at any stage of the litigation."

Jainendra Singh v. State of U.P., MANU/SC/ 0605/2012 : 2012 (8) SCC 748, Hon'ble Supreme Court considered the fact of appointment obtained by fraud and held as under:

"29.1 Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.

29.2 Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if find not desirable to appoint a person to a disciplined force can it be said to be unwarranted.

29.3 When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry.

29.4 A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services.

29.5 Purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will have clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

29.6 The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.

29.7 The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

29.8 An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.

29.9 An employee in the uniformed service presupposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

29.10 The authorities entrusted with the responsibility of appointing Constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a

Constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Constable."

REJECTION OF PLAINT

In **Saleem Bhai vs. State of Maharashtra** **MANU/SC/1185/2002 : (2003) 1 SCC 557**, Apex Court has held as follows: 9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which needed to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.

In **Popat and Kotecha Property vs. SBI Staff Association** **MANU/SC/0516/2005 : (2005) 7 SCC 510**, Apex Court has held that the plaint averments cannot be compartmentalized or dissected, nor can the averments be read in isolation.

Mayar (H.K.) Ltd. vs. Vessel M.V. Fortune Express
MANU/SC/8083/2006 : (2006) 3 SCC 100, it has been held as follows: 12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint.

In **Pearlite Linears (P) Ltd. vs. Manorama Sirsi**
MANU/SC/0016/2004 : AIR 2004 SC 1373, Apex Court has held that, when a suit is bound to be dismissed as barred by any law, it should be thrown out at the threshold.

In **Bhau Ram vs. Janak Singh and Others**
MANU/SC/0584/2012 : (2012) 8 SCC 701, Apex Court has held as follows:

15. The law has been settled by this Court in various decisions that while considering an application under Order 7 Rule 11 CPC, the court has to examine the averments in the plaint and the pleas taken by the defendant in the written statement would be irrelevant [vide C. Natarajan v. Ashim Bai MANU/SC/8018/2007 : (2007) 14 SCC 183, Ram Prakash Gupta v. Rajiv Kumar Gupta MANU/SC/3911/2007 : (2007) 10 SCC 59, Hardesh Ores (P) Ltd. v. Hede and Co. MANU/SC/7671/2007 : (2007) 5 SCC 614, Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express MANU/SC/8083/2006 : (2006) 3 SCC 100, Sopan Sukhdeo Sable v. Asstt. Charity Commr. MANU/SC/0071/2004 : (2004) 3 SCC 137 and Saleem Bhai v. State of Maharashtra

MANU/SC/1185/2002 : (2003) 1 SCC 557. The above view has been once again reiterated in the recent decision of this Court in Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust-- MANU/SC/0515/2012 : (2012) 8 SCC 706.

16. As rightly pointed out by the learned counsel for the respondents, the questions of law, as raised in the second appeal, before the High Court are no longer needed to be decided in view of the settled law that only the averments in the plaint can be looked into while deciding the application under Order 7 Rule 11. This aspect has been rightly dealt with by the High Court.

Yashavant vs. Senior Manager, A.B.N. Amro Bank N.V.: MANU/KA/2232/2013 - ILR 2013 KAR 3903 - From the statement of law in the decisions noticed supra, it is clear that while considering a case under Order 7 Rule 11 CPC, the Court has to look only into the averments in the plaint and that the averments made in the written statement or the application filed for rejection of plaint are immaterial, in as much as it is the duty of the Court to consider the pleading in the plaint and at that stage, the defence pleaded by the defendant in the written statement is wholly irrelevant. Hence, the contention urged that the plaint could not have been rejected before the defendant filed written statement has no merit.

N. Triveni vs. G.T. Shankar: MANU/KA /1139/2016 - ILR 2016 KAR 2429 - Rejection of the plaint in exercise of the power under Order 7 Rule 11 CPC, being a drastic power conferred on

the Court to terminate a civil action at the threshold i.e., without the trial of the suit, the conditions precedent to exercise the said power have to be strictly applied.-It is the averments made in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercising the power under Order 7 Rule 11 CPC, the case of the defendant stated in the written statement or in the application filed for rejection of the plaint is immaterial. It is only if the averments in the plaint ex-facie do not disclose a cause of action or the suit appears to be barred under any law, the plaint can be rejected. Otherwise, the case of the parties has to be adjudicated by conducting the trial.

The Shantinikethan Co-operative, House Building Society and Ors. vs. Raghavendra and Ors.: MANU/KA/3185/2015 - ILR 2016 KAR 1211 - An application for rejection of the plaint can be filed, if the averments made in the plaint is taken to be correct as a whole, on their face value show the suit to be barred by any law. For deciding the issue with regard to rejection of plaint by applying the provisions of Order 7 Rule 11 CPC, only the averments made in the plaint are relevant and not the defence of the defendant (See *Yashavant v. Senior Manager, A.B.N. Amro Bank N.V., New Delhi*, reported in MANU/KA/2232/2013 : ILR 2013 Kar 3903). Defendant can seek rejection of the plaint by recourse to Order 7 Rule 11 CPC at any time. In *Charan Lal Sahu v. Neelam Sanjeeva Reddy*, MANU/SC/0401/1978 : (1978) 2 SCC 500, Apex Court has held, that it is obligatory on the part of the court to reject a petition

outright and not to waste any more time upon a plaint or a petition, if the provision of law bar or shown to bar the proceedings. In *Narasamma V.K. v. Ramprasad*, reported in MANU/KA/0949/2012 : ILR 2012 Kar 4261, it has been held that it is an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the suit on merit.

The decision of the Apex Court, in **Dhulabhai v. State of Madhya Pradesh and Another**, MANU/SC/0157/1968 : AIR 1969 SC 78, makes it clear, that whenever a special statute bars the jurisdiction of the Civil Court by an express provision or by implication and makes decision of such authority not liable to be questioned in any Civil Court, the jurisdiction of the Civil Court would be excluded. If there is any express bar created in the special statute or if the special statute creates a special Tribunal and makes the decision final and not liable to be questioned in any Civil Court, then the jurisdiction of the Civil Court would stand barred.

Adv - Sridhara babu N

Adv - Sridhara babu N

**CHAPTER
SUMMONS**

**SUBSTITUTED SERVICE ONLY AS A LAST RESORT WHEN
DEFENDANT COULD NOT BE SERVED BY ORDINARY
PROCEDURE**

Smt. Yallawwa vs. Smt, Shantavva reported as JT 1996 (9) S. C. 218, Hon'ble Supreme Court held that substituted service under Order 5 Rule 20 CPC could be resorted to only as a last resort when defendant could not be served by ordinary procedure. In the present case, no sincere effort was made to serve summons on the defendants in the suit in ordinary course or by registered A. D. post and therefore, substituted service by publication in newspaper was not sufficient service.

SERVICE OF SUMMONS - COURTS SHALL HAVE TO BE VERY CAREFUL WHILE DEALING WITH A CASE WHERE ORDERS FOR DEEMED SERVICE ARE REQUIRED TO BE MADE ON THE BASIS OF ENDORSEMENT OF SUCH SERVICE OR REFUSAL.

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA **AIR 2005 SC 3353** BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that the defendants have been avoiding to accept summons. There have been serious problems in process-serving agencies in various Courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier as provided in Order V Rule 9. There is, however, a danger of false reports of service. It is required to be adequately guarded. The

Courts shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of person effecting service shall state as to who all were present at the time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if the affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be black-listed. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously as possible, requisite guidelines to the trial Courts by framing appropriate rules, order, regulations or practice directions.

**COURT SHALL ASCERTAIN FROM EACH PARTY OR HIS
PLEADER WHETHER HE ADMITS OR DENIES SUCH
ALLEGATIONS OF FACT AS ARE MADE IN THE PLAINT OR
WRITTEN STATEMENT**

**BADAMI (DECEASED) BY HER L.R. VS BHALI 2012 AIR
2858** It is seemly to note that the Code of Civil Procedure provides how the court trying the suit is required to deal with the

matter. Order IV Rule 1 provides for suit to be commenced by plaint. Order V Rule 1(1) provides when the suit has been duly instituted, a summon may be issued to defendant to appear and answer the claim on a day to be therein specified. As per the proviso to Order V Rule 1 no summon need be issued if the defendant appears and admits the claim of the plaintiff. Order X deals with the examination of parties by the court. Rule 1 of Order X provides for ascertainment whether allegations in pleadings are admitted or denied. It stipulates that “at the first hearing” of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court is required to record such admissions and denials. Use of the term ‘first hearing of the suit’ in Rule 1 has its own signification. Order XV Rule 1 lays a postulate that where “at the first hearing” of the suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce the judgment.

Court in Kanwar Singh Saini v. High Court of Delhi (2012) 4 SCC 307, while dealing with the concept of first hearing, “.....On the date of appearance of the defendant, the court does not take up the case for hearing or apply its mind to the facts of the case, and it is only after filing of the written statement and framing of issues, the hearing of the case commences. The hearing presupposes the existence of an occasion which enables the parties to be heard by the court in respect of the cause.

Hearing, therefore, should be first in point of time after the issues have been framed. The date of “first hearing of a suit” under CPC is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions raised by the parties in their respective pleadings and also to the documents filed by them for the purpose of framing the issues which are to be decided in the suit. Thus, the question of having the “first hearing of the suit” prior to determining the points in controversy between the parties i.e. framing of issues does not arise. The words “first day of hearing” do not mean the day for the return of the summons or the returnable date, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence is taken.

THE FIRST HEARING DATE OF THE SUIT

Three-Judge Bench of this Court in **Siraj Ahmad Siddiqui vs. Prem Nath Kapoor [1993 (4) SCC 406]**. The Bench laid down as follows : "The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit. Does the definition of the expression "first hearing" for the purposes of Section 20(4) U.P.Act, mean something different? The step or proceeding mentioned in the summons referred to in the definition should, we think, be construed to be a step or

proceeding to be taken by the court for it is, after all, a "hearing" that is the subject-matter of the definition, unless there be something compelling in the said Act to indicate otherwise; and we do not find in the said Act any such compelling provision. Further, it is not possible to construe the expression "first date for any step or proceeding" to mean the step of filing the written statement, though the date for that purpose may be mentioned in the summons, for the reason that, as set out earlier, it is permissible under the Code for the defendant to file a written statement even thereafter but prior to the first hearing when the court takes up the case, since there is nothing in the said Act which conflicts with the provisions of the Code in this behalf. We are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary."

WHEN COUNSEL HAD WITHDRAWN THE VAKALATNAMA - AT LEAST A NOTICE OUGHT TO HAVE BEEN GIVEN TO SUCH A LITIGANT TO MAKE AN ALTERNATIVE ARRANGEMENT

Goswami Krishna Murarilal Sharma v. Dhan Prakash and Ors. (1981) 4 SCC 474, where the counsel had withdrawn his Vakalatnama without notice to his client. The Hon'ble Supreme Court following its earlier judgment in Rafiq, held that the Court should not have proceeded to dismiss the appeal straight away on the ground that the appellant was not present in person when his counsel had withdrawn the Vakalatnama. At least a notice

ought to have been given to such a litigant to make an alternative arrangement or appear in person.

IN CASE A LITIGANT IS NEITHER NEGLIGENT NOR CARELESS IN PROSECUTING HIS CASE BUT HIS LAWYER PLEADS NO INSTRUCTION, THE COURT SHOULD ISSUE NOTICE TO HIM TO MAKE AN ALTERNATIVE ARRANGEMENT

Malkiat Singh and Anr. v. Joginder Singh and Ors. AIR 1998 SC 258, observing that in case a litigant is neither negligent nor careless in prosecuting his case but his lawyer pleads no instruction, the Court should issue notice to him to make an alternative arrangement. Such a course is required in the interest of justice and the Court may proceed from the stage the earlier counsel pleaded no instruction. If the litigant is not at fault, he should not suffer for such a conduct of his counsel.

DELAY DUE TO ADVOCATE'S DERELICTION IN DUTY WITHDRAWING HIS VAKALATNAMA WITHOUT NOTICE TO HIS CLIENT WARRANTED CONDONATION

In Sushila Narahari and Ors. v. Nand Kumari , JT 1996 (6) 727, 1996 SCALE (5)494 the case was dismissed in default and an application for restoration was dismissed on the ground that there was a delay of 40 days in filing the application for restoration The Hon'ble Apex Court held that the delay due to

advocate's dereliction in duty withdrawing his Vakalatnama without notice to his client warranted condonation.

PRESUMPTION OF SERVICE OF NOTICE

The legal position as to when the presumption of "due service" under Illustration (e) of Section 114 of the Evidence Act can be raised, or is available, is well settled. This has been considered by this Court in Noorera Papu v. Machinadu Kushalappa, ILR 1985 KAR 901. The relevant portion of the decision is as follows : "The legal position as to when the presumption of 'due service' under Illustration (e) of Section 114 of the Evidence Act can be raised, or is available, is well settled. It is a rebuttable presumption. If the evidence relating to refusal of notice sent by registered post by the addressee is acceptable, the presumption of 'due service' under Illustration (e) of Section 114 of the Evidence Act is available and in such cases it can be raised. On the contrary, if the evidence on the point is not acceptable, the question of raising the presumption does not arise, as in such, a case, there will not be a proof of an attempt made by the postman to serve the registered notice on the addressee and refusal of the same by the addressee. It is not always necessary to examine the postman who tried to effect service. The denial by the addressee that he has refused to receive the notice sent by registered post, may even be found to be unacceptable on the other evidence on record. Sometimes, it may even be possible to reject the evidence of the addressee that he had not refused to receive the notice from his admissions or conduct or other evidence on record.

Therefore, as a rule, it cannot be laid down that the presumption available under Illustration (e) of Section 114 of the Evidence Act, is rebutted on the addressee entering the witness-box and stating on oath that he had never refused to receive the notice. It depends upon the total effect of the evidence on record".

THERE IS NO REASON TO DISBELIEVE THE POSTAL SHARAS THAT THE ADDRESSEE REFUSED TO RECEIVE

Supreme Court in Puwada Venkateswara Rao v. Chidamana Venkata Ramana, 1976 AIR 869, 1976 SCR (3) 551 In the instant case it has already been held that the case of the petitioner that she was away from her house and was an inpatient in the hospital at Ichalakaranji is not worthy of acceptance and it is accordingly rejected. It has also been further held that there is no reason to disbelieve the postal sharas that the addressee refused to receive. That being so, in the instant case, the presumption of 'due service' is available and it can very safely be raised and the knowledge of the contents of the notice can very well be imputed to her. Thus, when the petitioner refused to receive the notice she had full knowledge of the contents of the notice. Accordingly, the first Point is answered in the affirmative and against the petitioner.

JUDICIAL PROCESS SHOULD NEVER BECOME AN INSTRUMENT OF OPPRESSION OR ABUSE OR A MEANS IN THE PROCESS OF THE COURT TO SUBVERT JUSTICE

Noorduddin v. Dr. K. L. Anand, 1995 (1) SCC 242 : (1994 AIR SCW 5093) the Apex Court observed as under (at page 5099 of AIR SCW): "The object of law is to mete out justice. Right to the right, title or interest of a party in the immovable property is a substantive right. But the right to an adjudication of the dispute in that behalf is a procedural right to which no one has a vested right. The faith of the people in the efficacy of law is the saviour and succour for the sustenance of the rule of law. Any weakening like in the judicial process would rip apart the edifice of justice and create a feeling of disillusionment in the minds of the people of the very law and courts. The rules of procedure have been devised as a channel or a means to render substantive or at best substantial justice which is the highest interest of man and almighty for the mankind. It is a foundation for orderly human relations. Equally the judicial process should never become an instrument of oppression or abuse or a means in the process of the Court to subvert justice."

PROPERTY GRABBERS, TAX EVADERS, BANK LOAN DODGERS AND OTHER UNSCRUPULOUS PERSONS FROM ALL WALKS OF LIFE FIND THE COURT PROCESS A CONVENIENT LEVER TO RETAIN THE ILLEGAL GAINS INDEFINITELY

Chief Justice Edward Coke of England observed three centuries ago that "fraud avoids all judicial acts, ecclesiastical or temporal," quoted in *S.P.Chengalvaraya Naidu v. Jagannath*, 1994 (1) SCC 1 : **(AIR 1994 SC 853)** where the Supreme Court further

observed as under (at page 855 of AIR): "The Courts of Law are meant for imparting justice between the parties. One who comes to the Court must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property grabbers, tax evaders, bank loan dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court."

In *S.P. Chengalvaraya Naidu v. Jagannath* [(1994) 1 SCC 1] this Court in no uncertain terms observed: "...The principle of 'finality of litigation' cannot be passed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation... A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the Court, is bound to produce all the documents

executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

DECREE PASSED BY A COURT WITHOUT JURISDICTION IS A NULLITY, & THAT ITS INVALIDITY COULD BE SET UP WHENEVER AND WHEREVER IT IS SOUGHT TO BE ENFORCED OR RELIED UPON

In the case of **Kiran Singh and others v. Chaman Paswan and others AIR 1954 S.C.340**, question was raised, when decree passed by a Court is nullity and whether execution of such a decree can be resisted at the execution stage which would obviously mean by taking an objection under Section 47 of the Code. Venkatarama Ayyar, J. speaking for himself and on behalf of B.K.Mukherjea, Vivian Bose, Ghulam Hasan, JJ., observed at page 352 thus: It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, & that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings.

Devasahayam (Dead) by LRs. v. P. Savithramma and others, MANU/SC/0568/2005 : (2005) 7 SCC 653. "42. It is now well-settled that a decree passed by a Court having no jurisdiction is a nullity. The Civil Court had no jurisdiction to pass a decree for eviction only on the basis that the tenant had denied their title.

The matter might have been different if the Civil Court had otherwise jurisdiction to entertain a suit. The legislature has created new rights and liabilities for both the landlord and tenant in terms of the provisions of the said Act and provided a forum therefore. The jurisdiction of the Civil Court having been barred except in a situation where the proviso appended to sub-section (1) of Section 10 would be attracted, the Civil Court had no jurisdiction to entertain a suit for eviction on a ground envisaged under Section 10(2)(vi) of the A.R Buildings (Lease, Rent and Eviction) Control Act. The Civil Court, thus, had no jurisdiction to entertain the counterclaim.

In Kiran Singh v. Chaman Paswan MANU/SC/0116/1954 : [(1955) 1 SCR 117 : AIR 1954 SC 340] it was stated: "It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

In Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. [MANU/SC/0611/2003 : (2003) 7 SCC 418] Court held: "31. ... An order which lacks inherent jurisdiction would be

a nullity and, thus, the procedural law of waiver or estoppel would have no application in such a situation."

In Dwarka Prasad Agarwal v. B.D. Agarwal

[MANU/SC/0450/2003 : (2003) 6 SCC 230] it was opined: "37.

It is now well-settled that an order passed by a Court without jurisdiction is a nullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. In the instant case, as the High Court did not have any jurisdiction to record the compromise for the reasons stated hereinbefore and in particular as no writ was required to be issued having regard to the fact that public law remedy could not have been resorted to, the impugned orders must be held to be illegal and without jurisdiction and are liable to be set aside. All orders and actions taken pursuant to or in furtherance thereof must also be declared wholly illegal and without jurisdiction and consequently are liable to be set aside. They are declared as such."

In Church of North India v. Lavajibhai Ratanjibhai

[MANU/SC/2531/2005: (2005) 10 SCC 760 : JT (2005) 5 SC

202] Court observed: "The provisions of the Act and the scheme thereof leave no manner of doubt that the Act is a complete code in itself. It provides for a complete machinery for a person interested in the trust to put forward his claim before the Charity Commissioner who is competent to go into the question, and to prefer appeal if he feels aggrieved by any decision. The bar of jurisdiction created under Section 80 of the Act clearly points out

that a third party cannot maintain a suit so as to avoid the rigours of the provisions of the Act. The matter, however, would be different if the property is not a trust property in the eye of the law. The Civil Court's jurisdiction may not be barred as it gives rise to a jurisdictional question. If a property did not validly vest in a trust or if a trust itself is not valid in law, the authorities under the Act will have no jurisdiction to determine the said question."

MERELY BECAUSE COURT MADE AN ERROR IN DECIDING A VITAL ISSUE IN THE SUIT, IT CANNOT BE SAID THAT IT HAS ACTED BEYOND ITS JURISDICTION

In the case of **Ittyavira Mathai v. Varkey Varkey and another AIR 1964 S.C.907**, the question which fell for consideration before this Court was if a Court, having jurisdiction over the parties to the suit and subject matter thereof passes a decree in a suit which was barred by time, such a decree would come within the realm of nullity and the Court answered the question in the negative holding that such a decree cannot be treated to be nullity but at the highest be treated to be an illegal decree. While laying down the law, the Court stated at page 910 thus:- If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having

jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities.

WHEN THE DECREE IS MADE BY A COURT WHICH HAS NO INHERENT JURISDICTION TO MAKE IT, OBJECTION AS TO ITS VALIDITY MAY BE RAISED IN AN EXECUTION PROCEEDING

Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and others AIR 1970 S.C.1475, When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not

appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

JUDGMENT IN REM IS OPEN TO ATTACK ON THE GROUND THAT THE COURT, WHICH GAVE IT, HAD NO JURISDICTION TO DO SO

In **Smt. Satya v. Teja Singh, AIR 1975 SC 105**, the Supreme Court observed as under :- "Section 41 of the Indian Evidence Act provides, to the extent material, that a final judgment of the Competent Court, in the exercise of matrimonial jurisdiction, is conclusive proof that a legal character, which it confers or takes away, accrued or ceased at the time declared in the judgment for that purpose. But, the judgment has to be of a Competent Court, i.e., a Court having jurisdiction over the parties and the subject matter. Even a judgment in rem is, therefore, open to attack on the ground that the Court, which gave it, had no jurisdiction to do so."

NOTICE ON CAVEAT TO ADVOCATE FOR CAVEATOR

Nova Granites (India) Ltd. vs Coach Kraft (Bangalore) Pvt. Ltd. ILR 1994 KAR 52, 1993 (4) KarLJ 661 Whenever a Caveat is filed through a Lawyer and when the address for service is given as his address, notice of application for interim order

should be served on the Lawyer. However, the failure to serve the notice on him will not by itself render the order null and void, if the notice in fact served on the party no prejudice is caused to the party on that count in the facts and circumstances of a particular case. However, it is the duty of the Court to see that the notice of such an application should be served to the Advocate for Caveator as long as that Caveat Petition is alive.

ABUSE OF PROCESS OF COURT THROUGH RE-LITIGATION

In K.K.Modi vs. K.N.Modi [(1998) 3 SCC 573], the Supreme Court, while considering the abuse of process of Court, held that the same depends upon the relevant circumstances for which the public policy and interest of justice are to be considered. The relevant portion of the judgment of Supreme Court is as follows:

43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraphs 18/19/33 (p.344) explains the phrase abuse of the process of the court thus: This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material.

44. One of the examples cited as an abuse of the process of the court is re litigation. It is an abuse of the process of the court and

contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata. But if the same issue is sought to be reagitated, it amounts to an abuse of the process of the court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of the court's discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The court should also be satisfied that there is no chance of the suit succeeding.

INHERENT POWERS OF COURT TO STOP ABUSE OF PROCESS OF COURT

In Manohar Lal Chopra v. Raj Bahadur Rao Raja Seth Hiralal 1962 AIR 527, 1962 SCR Supl. (1) 450, the law is stated in the following terms: "The Code of Civil Procedure is undoubtedly not exhaustive: it does not lay down rules for guidance in respect of all situations nor does it seek to provide rules for decision of all conceivable cases which may arise. The civil courts are authorized" to pass such orders as may be necessary for the ends

of justice, or to prevent abuse of the process of court, but where an express provision is made to meet a particular situation the Code must be observed, and departure therefrom is not permissible."

NO COUNTRY IS BOUND BY COMITY TO GIVE EFFECT IN ITS COURTS TO DIVORCE LAWS OF ANOTHER COUNTRY WHICH ARE REPUGNANT TO ITS OWN LAWS AND PUBLIC POLICY

Case of Smt. **Satya v. Teja Singh**, (1975) 1 SCC 120, the judgment and decree of divorce passed by a Court in Nevada was completely disregarded by the Courts in India because the Courts of this country reached the conclusion that the decree was passed by the Court of in-competent jurisdiction, which cannot be accepted by the Courts in India. Hon'ble the Supreme Court observed that no country is bound by comity to give effect in its courts to divorce laws of another country which are repugnant to its own laws and public policy. The judgment and decree was also found to be delivered by a Court which has no jurisdiction and it was obtained fraudulently.

The aforementioned principles have been followed and applied by Hon'ble the Supreme Court in later judgments in the cases of *Sankaran Govindan v. Lakshmi Bharathi*, (1975) 3 SCC 351; *R.S.A. No. 563 of 1980* 17 Y. *Narasimha Rao v. Y. Venkata Lakshmi*, (1991) 3 SCC 451; and *Rohini Damji Sidpra v. Freny Damji Sidpra*, (2001) 10 SCC 588.

CIVIL COURT JURISDICTION AND FRAUDULENT ACTS OF CREDITOR

Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India II (2004) BC 397 (SC) : 110 (2004) DLT 665 (SC) : 2004(5) All MR (SC) 484, **2003 (6) SCALE 7** whereby the Supreme Court has upheld the provisions of the said Act ousting the jurisdiction of Civil Court in the matters to which the provisions of the Securitization Act apply. From the provisions of Sub-section (1) of Section 13 of the Securitization Act quoted above, it is clear that the provisions of Sections 69 and 69A of the Transfer of Property Act, which pertain to the power of the mortgagee for sale and appointment of Receiver in respect of mortgaged property are excluded or overridden by Section 13(1) of the Securitization Act.

Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under section 13(4) of the Act have been taken, a mechanism has been provided under section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows :

1. Under sub-section (2) of section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application

of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under section 17 of the Act before the Debt Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition at it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75 per cent of amount claimed before entertaining an appeal (petition) under section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the Court.

TO WHAT EXTENT JURISDICTION OF CIVIL COURT BARRED UNDER SECURITIZATION ACT

Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India II (2004) BC 397 (SC) : 110 (2004) DLT 665 (SC) : 2004(5) All MR (SC) 484, **2003 (6) SCALE 7** A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of section.

However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages.

Madras High Court in V. Narasimhachariar v. Egmore Benefit Society, 3rd Branch Ltd. AIR 1955 Mad. 135, "22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are two fold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the

pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought : *Adams v. Scott* (1859) 7 WR (Eng) 213 (249). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely.

Where a borrower tenders to the creditor the amount due with costs and expenses incurred, no further steps for sale of the property are to take place. In this connection, a reference has also been made by the learned Attorney General to a decision in *Naraindas Karsondas V. S.A. Kamtam* (1977) 3 SCC 247, which provides that a mortgagor can exercise his right of redemption any time until the final sale of the property by execution of a conveyance.

RIGHT TO WORSHIP IS A CIVIL RIGHT

In *Ugamsingh & Mishrimal v. Kesrimal and Ors.* MANU/SC/0537/1970 : [1971]2SCR836 , it was held that right to worship is a civil right which can be subject matter of a civil suit. The Court observed : It is clear therefore that a right to worship is a civil right, interference with which raises a dispute of a civil nature.

In Devendra Narain Sarkar and Ors. v. Satya Charon Mukerji and Ors. MANU/WB/0202/1926 : AIR1927Cal783 it was held that a suit by a person claiming to be entitled to a religious office against an usurper, for a declaration of his right to the office is a suit of a civil nature. Similarly in S.Ramnuja Jeer (supra) this Court observed as under : From the aforesaid passage it is clear that so long as the holder of a purely religious office is under a legal obligation to discharge duties attached to the said office for the non-observance of which he may be visited with penalties, a civil court could grant a declaration as to who would be or could be the holder or such office.

Most. Rev. P.M.A. Metropolitan and others, etc. etc. vs. Moran Mar Marthoma and another etc. etc.: MANU/SC/0407/1995

In His Holiness Srimad Perarulala Ethiraja Ramanuja Jeeyar Swami Etc. v. The State of Tamil Nadu MANU/SC/0631/1972 : [1972]3SCR815 it was held that this Article guarantees freedom to practice rituals and ceremonies which are integral parts of a religion. In Rev. Stainislaus v. State of Madhya Pradesh and Ors. MANU/SC/0056/1977 : 1977CriLJ551 it was held that right to practice and propagate not only matters of faith or belief but all those rituals and practices which are regarded as integral parts of a religion by the followers of a doctrine. In S.P. Mittal v. Union of India and Ors. : [1983]1SCR729 , it was held that freedom or right involving the conscience must naturally receive a wide

interpretation. The suit filed was thus maintainable. The injunction and prohibition sought from interfering in administration of Church are certainly matters which pertain to the religious office. Even the declaration that the Church is episcopal is covered in the expansive expression of religion as explained in Mittal's case (supra). The word 'episcopal, means 'of or pertaining to bishops, Having a govt. vested in bishop'. A suit for declaration of such a right would be maintainable under Section 9. Not only because it is claim to an office but also because there is no other forum where such dispute can be resolved. If a dispute arises whether a particular religious shrine has ceased to be so due to its anti-religion activities then the followers of that religion or belief and faith cannot be denied the right to approach the court. Explanation I is not restrictive of the right or matters pertaining to religion. It only removes the doubt to enable the courts to entertain suits where dispute about religious office is involved. The right to religion having become fundamental right, it would include the right to seek declaration that the Church was Episcopal. But the court may refrain from adjudicating upon purely religious matters as it may be handicapped to enter into the hazardous, hemisphere of religion. Maintainability of the suit should not be confused with exercise of jurisdiction. Nor is there any merit in the submission that Explanation I could not have suits where the right to property or to an office was not contested or where the said right depended on decisions of questions as to religious faith, belief, doctrine or creed. The emphasis on the expression 'is contested' used in Explanation I is not of any consequence. It widens the ambit of

the Explanation and include in its fold any right which is contested to be a right of civil nature even though such right may depend on decisions of questions relating to religious rights or ceremonies. But from that it cannot be inferred that where the right to office or property is not contested it would cease to be a suit cognisable under Section 9. The argument is not available on facts but that shall be adverted later. Suffice it to mention that in Ugamsingh (supra) the plaintiffs claim was that they were entitled to worship without interference of the idol of Adeshwarji in the temple named after him at Paroli according to tenants observed by the Digambri Sect on the Jain religion. It was held that from the pleadings and the controversy between the parties it was clear that the issue was not one which was confined merely to rites and rituals but one which effected the rights of worship. If the Digambaries have a right to worship at the temple, the attempt of the Swetamberies to put Chakshus or to place Dhwandand or Kalash in accordance with their tenets and to claim that the idol is a Swatamberi idol was to preclude the Digambaries from exercising their right to worship at the temple, with respect to which a civil suit is maintainable under Section 9 of the Civil Procedure Code. The scope of the Section was thus expanded to include even right to worship.

Unichem Laboratories Ltd. vs. Rani Devi and Ors.:
MANU/SC/0435/2017 Section 9 of the Code provides that the Courts shall have jurisdiction to try all suits of a "civil nature" excepting suits of which their cognizance is either expressly or impliedly barred. A suit filed to claim eviction from any

accommodation is a suit of "civil nature" and, therefore, the Civil Court is competent to take cognizance of such suit unless its jurisdiction is expressly or impliedly barred by virtue of any special Enactment. It is not so here.

20. As mentioned above, the jurisdiction of the Civil Court to try the eviction cases arising under the Act was barred by virtue of Section 21 till 28.04.1972 because the power to try such cases was vested in Labour Commissioner. It was permissible for the Legislature to do so. However, on and after 28.04.1972, Labour Commissioner was divested with the power to try the eviction cases by reason of deletion of Section 21 from the Act. The jurisdiction to try the suits arising under the Act, therefore, stood restored to the Civil Court by virtue of Section 9 of the Code because the Legislature then did not confer such powers to try the matters arising under the Act on other specified authority on and after 28.04.1972. It is for these reasons, we are of the considered opinion that the Civil Court was justified in trying and deciding the suit out of which this appeal arises.

It is a settled principle of law that exclusion of jurisdiction of the Civil Court is not to be readily inferred and such exclusion is either be "explicitly expressed or clearly implied". It is a principle by no means to be whittled down and has been referred to as a "fundamental rule". As a necessary corollary of this rule, provisions excluding jurisdiction of Civil Courts are required to be construed strictly. In other words, it is trite Rule of interpretation that existence of jurisdiction in Civil Courts to decide questions of civil nature is a general Rule whereas the

exclusion is an exception. The burden is, therefore, on the party who raises such a contention to prove such exclusion.

The Constitution Bench of Court in a leading case of *Dhulabhai etc. v. State of Madhya Pradesh and Anr.* MANU/SC/0157/1968 : AIR 1969 SC 78 examined the question as to how the exclusion of jurisdiction of Civil Court in the context of express or implied bar created in any special law should be decided. Their Lordships examined the question in the context of Section 9 of the Code of Civil Procedure, 1908 and the bar created in special law.

LACK OF JURISDICTION COURT SHOULD FIRST SEE IT WHEN BROUGHT TO NOTICE

Sundaram Finance Limited and Ors. vs. T. Thankam: MANU/SC/0177/2015 Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law-generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.

Jyoti Limited and Ors. vs. Bharat J. Patel and Ors.:
MANU/SC/0290/2015 The maintainability of a suit is question of law. Though, by virtue of declaration Under Section 9 of the Code of Civil Procedure, 1908, all suits of civil nature are maintainable unless barred either by an express provision or by implication of law. In the case on hand, when a specific stand is taken that in view of the provisions of Companies Act the suit is not maintainable, "the checkered history between the contesting parties and the chronology of the actions taken by the Respondents", in our opinion, do not decide the maintainability of the suit. We find the conclusion recorded by the High Court to be highly unsatisfactory.

Court in the case of **Mathai v. Varkey Varkey**
MANU/SC/0260/1963 : (1964) 1 SCR 495, submitted that a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong, and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. In other words, courts having jurisdiction to decide right or to decide wrong and even though decide wrong, the decree rendered by them cannot be treated as nullity.

Apex Court in **Chief Engineer, Hydel Project Vs. Ravinder Nath & others** **MANU/SC/0573/2008 : 2008 (2) SCC 350**, it is contended that neither consent nor waiver or acquiescence of a party can confer jurisdiction upon a Court, otherwise incompetent to try the suit. The decree passed by a court without

jurisdiction is a coram non judice. A defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. Once the original decree itself is found to be without jurisdiction and hit by doctrine of coram non judice, there would be no question of upholding the same merely on the ground that the objection to its jurisdiction was not taken at the initial, first appellate or the second appellate stage.

Kiran Singh & others Vs. Chaman Paswan & others

MANU/SC/0116/1954 : AIR 1954 SC 340, it is contended that it is a fundamental principle that a decree passed by a court without jurisdiction is nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction in respect to the subject matter of the action brought before the court strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by consent of the parties.

Ram Singh & others Vs. Gram Panchayat, Mehal Kalan & others

MANU/SC/0394/1986 : AIR 1986 SC 2197, it is contended that the plaintiff by presenting a cleverly drafted plaint to circumvent the provisions of law in order to invest jurisdiction in civil court, cannot get indulgence. The question as to the right of the plaintiff in the suit land has to be decided by the competent court of law. The court having no jurisdiction cannot grant any declaration of right of the plaintiff in the suit property.

Chandrika Misir & another Vs. Bhaiyalal

MANU/SC/0328/1973 : AIR 1973 SC 2391, it is contended that the plea that the court is inherently lacking in jurisdiction, the plea may be raised at any stage, even in execution proceeding on the ground that the decree was a nullity.

Ram Awalamb & others Vs. Jata Shankar & others AIR 1969

Allid 526, it is contended that where the suit is for more than one relief, one or more of them cognizable only by the civil court and at least one relief is cognizable only by the revenue court, it has to be ascertained as to whether the main relief asked for on the basis of the cause of action disclosed in the suit can be granted only by a revenue court. If the real and the substantial relief could be granted only by the revenue court, there remains no doubt that other ancillary relief can also be granted by the revenue court and the jurisdiction shall vests in the revenue court and not in the civil court.

SECTION 8 OF ARBITRATION ACT AND JURISDICTION

Court in P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (Dead) and Ors. MANU/SC/0281/2000 : (2000) 4 SCC 539.

Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of the Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement.

Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums MANU/SC/0482/2003 : (2003) 6 SCC

503. Court in the case of P. Anand Gajapathi Raju v. P.V.G. Raju has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator.

Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the Respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration.

In Branch Manager, Magma Leasing and Finance Limited and Anr. v. Potluri Madhvilata and Anr. MANU/SC/1672/2009 : (2009) 10 SCC 103, the position has been restated holding that no option is left to the court, once the pre-requisite conditions of Section 8 are fully satisfied.

In Sukanya Holdings (P) Limited v. Jayesh Pandya and Anr. MANU/SC/0310/2003 : (2003) 5 SCC 531 at paragraphs-16 and 17, it was held as follows: 16. The next question which requires consideration is--even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible Under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-

matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

JURISDICTION MUST INCLUDE THE POWER TO HEAR AND DECIDE THE QUESTIONS AT ISSUE

Official Trustee v. Sachindra Nath Chatterjee
MANU/SC/0240/1968 : AIR 1969 SC 823, a three Judges Bench of this Court while deciding the question of jurisdiction of the Court under the Trust Act observed: 15. From the above discussion it is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the

authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties.

QUESTION OF LIMITATION INVOLVES A QUESTION OF JURISDICTION

ITW Signode India Ltd. v. CCE MANU/SC/0938/2003 : (2004) 3 SCC 48, a similar question came before a three Judges Bench of this Court under the Central Excise Act, 1944, when this Court opined as under:

69. The question of limitation involves a question of jurisdiction. The finding of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the Appellant by way of fraud, collusion, wilful misstatement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show-cause notice in terms of Rule 10 could have been issued.

WHEN ACT CONFERS JURISDICTION IT IMPLIEDLY CONFER POWER TO IMPLIMENT IT

Supreme Court in Sub-Divisional Officer, Sadar Faizabad v. Shamboo Narain Singh, 1970 AIR 140, 1970 SCR (1) 151. of the judgment, the, Supreme Court has observed as follows : "It is well recognised that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary .to, its execution. But before implying the existence of such a power the Court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power."

EXCLUSION OF JURISDICTION OF CIVIL COURT

As far as the jurisdiction issue is concerned, the Apex Court in the case of **Dhulabhai v. State of M.P. AIR 1969 SC 78**, has laid down the principles regarding exclusion of jurisdiction of civil court and the said principle are as under:

(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil

suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply: case law discussed.

In State of Andhra Pradesh v. Manjeti Laxmi Kantha Rao 2000 AIR SCW 2334, the Hon'ble Supreme Court, while referring to Dhulabhai case(supra) laid down a test to be adopted in examining the question whether jurisdiction of the Civil Court is excluded, as under: "The normal rule of law is that Civil Courts have jurisdiction to try all suits of civil nature except those of which cognisance by them is either expressly or impliedly excluded as provided under Section 9 of the Code of Civil Procedure but such exclusion is not readily inferred and the presumption to be drawn must be in favour of the existence rather than exclusion of jurisdiction of the Civil Courts to try civil suit. The test adopted in examining such a question is (i) whether the legislature intent to exclude arises explicitly or by necessary implication, and (ii) whether the statute in question provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it."

In the case of Irawwa and Ors. v. Krishnaji Venkatesh Naik and Ors. 1996 (2) KLJ 285 Court has held that in respect of boundary dispute under the Karnataka Land Revenue Act, 1964,

if a dispute arises, the same will have to be decided by the Survey Officer and the Tahsildar and not by the Civil Court.

Ramajois v. Chief secretary dealing with a case arising out of an order passed by the Tahsildar under the Land Revenue Act, 1964, this Court has held thus: The order in question having been issued by the Tahsildar who is Revenue Officer subordinate to the Assistant Commissioner, an appeal lies under Clause (a) of Section 49. The jurisdiction of Civil Courts to entertain any suit or other proceeding against the State Government on account of any act or omission of the State Government or any Revenue Officer is barred under Section 63 of the Act, unless the plaintiff first proves that prior to the institution of the suit or other proceeding, he has presented all such appeals allowed by the law for the time being in force, within the period of limitation. Section 63 is an express bar to the filing of a suit, unless the plaintiff has exhausted the remedies provided under the Act by filing an appeal. When there is an express bar in the Act, Section 9 of CPC will not come to the aid of the appellant.

Whether the Civil Court has got the jurisdiction to go into the issue concerning fixing of boundaries, maintenance of boundaries of lands or sub-division of lands came up for consideration in the case of Patel **Doddakempegowda v. Chikkeeregowda** ILR 1986 KAR 2404 and dealing with the said question, this Court has laid down the following provisions of law: Section 61(e)(ii) of the Act not only lays down that the exclusive jurisdiction is of Revenue Court, but also bars the

jurisdiction of Civil Courts...when the Civil Court has no jurisdiction to hold that an entry made in any record of revenue survey or settlement is wrong, it cannot, in law proceed to grant the relief prayed for by the plaintiff because that relief is based on such a finding to be recorded by the Civil Court. The object behind Section 61 is to provide finality for the acts covered by it and the other provisions Page 2282 of the Act viz., Sections 109 and 140. It has been left to the exclusive jurisdiction of the Revenue Courts to fix the boundaries and maintain the boundaries of lands or sub-division of lands, to fix the revenue and re-assess the revenue and so on. Civil Courts are not permitted to have a hand in any of these matters.

PRINCIPLES OF RES JUDICATA

In Rajendra Kumar v. Kalyan (Dead) by Lrs. [(2000) 8 SCC 99]

Court merely held that the expression 'court of limited jurisdiction' is of wide amplitude. The Court made a distinction between a procedural statute and a substantive statute for applicability of the principles of res judicata. In that case the earlier suit was filed before a court of competent jurisdiction.

In Mahila Bajrangi (Dead) through Lrs. & Ors. v. Badribai w/o Jagannath & Anr. [(2003) 2 SCC 464]

Court clearly held that the principles of res judicata would be applicable only when an issue arose directly and substantially in an earlier suit, a finding

regarding an incident or collateral question reached for the purpose of arriving at the final decision would not constitute res judicata.

In Union of India v. Pramod Gupta (D) by Lrs. & Ors. [JT (2005) 8 SC 203] Court opined: "28- The principle of res judicata would apply only when the lis was inter parties and had attained finality in respect of the issues involved. The said principle will, however, have no application inter alia in a case where the judgment and/or order had been passed by a court having no jurisdiction therefore, and/or in a case involving pure question of law. It will also have no application in a case where the judgment is not a speaking one."

In Madhvi Amma Bhawani Amma and others Vs. Kunjikutty Pillai Meenakshi Pillai and others MANU/SC/0393/2000 : (2000) 6 SCC 301, wherein the Apex Court held as follows: "In order to apply the general principle of res judicata, the Court must first find, whether an issue in a subsequent suit was directly and substantially in issue in the earlier suit or proceedings, was it between the same parties, and was it decided by such Court." "Thus there should be an issue raised and decided, not merely any finding on any incidental question for reaching such a decision. So if no such issue is raised and if on any other issue, incidentally any finding is recorded it would not come within the periphery of the principle of res judicata."

Commissioner of Endowments and others Vs. Vittalrao and others MANU/SC/1003/2004 : (2005) 4 SCC 120, wherein the Apex Court rejected such plea and ruled as follows: "The test is whether the Court considered the adjudication of the issue, though not formally framed, material and essential for its decision. If the issue of title was raised in the earlier suit and the basis of the grant of relief of injunction is the finding would operate as res judicata in the latter suit for declaration of title."

Isher Singh v. Sarwan Singh MANU/SC/0345/1964 : AIR 1965 SC 948 has observed: 11. We thus reach the position that in the former suit the heirship of the respondents to Jati deceased (a) was in terms raised by the pleadings, (b) that an issue was framed in regard to it by the trial Judge, (c) that evidence was led by the parties on that point directed towards this issue, (d) a finding was recorded on it by the appellate court, and (e) that on the proper construction of the pleadings it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that every one of the conditions necessary to satisfy the test as to the applicability of Section 11 of the Civil Procedure Code is satisfied.

In Swamy Atmandanda v. Sri Ramakrishna, Tapovanam MANU/SC/0287/2005 : (2005) 10 SCC 51, it was held by this Court:

26. The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to

uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment.

27. The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.

Sulochana Amma v. Narayanan Nair MANU/SC/ 0047/1994 : (1994) 2 SCC 14. It is observed: The decision in earlier case on the issue between the same parties or persons under whom they claim title or litigating under the same title, it operates as a res-judicata. A plea decided even in a suit for injunction touching title between the same parties, would operate as res-judicata.It is a settled law that in a Suit for injunction when title is in issue, for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties when the same is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit, the decree in injunction suit equally operates as a res-judicata.

Gram Panchayat of Village Naulakha v. Ujagar Singh and Ors.

MANU/SC/0628/2000 : AIR 2000 SC 3272. Court has stated, that, even in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in the later suit or proceedings, where title is directly in question, unless it is established, that it was "necessary" in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the bindings of title. Even the mere framing of an issue may not be sufficient as pointed out in that case.

RESJUDICATA IN CASE OF FINDINGS OF CIVIL COURT AND SAME ISSUE BEFORE REVENUE COURT

Ramchandra Dagdu Sonavane (Dead) by L.Rs. and Ors. vs. Vithu Hira Mahar (Dead) by Lrs. and Ors. :

MANU/SC/1731/2009 - AIR 2010 SC 818 "The appellants had filed O.S. No. 104 of 1953 before the civil court inter-alia seeking an order of permanent injunction against respondent - Vithu and others, on the ground that they are Watandars of suit lands and they are in peaceful possession and enjoyment of the suit lands. Respondent - Vithu had set up a defence that since he is the adopted son of the deceased Watandar, he has the right, title and interest in the watanlands. Therefore, the Trial Court had framed an issue, whether the defendants prove that defendant No. 1 was the adopted son of his grandmother and as such was in possession of the suit property. The trial court after elaborate

discussion has answered the issue against Vithu and had concluded that Vithu failed to prove that he was the adopted son of deceased Watandar and, therefore, he cannot have any right, title or interest in the suit lands as Watandar. In this case, though the suit was bare injunction, title to the properties was put on issue by the defendant-Vithu claiming that he is the adopted son of deceased Watandar and, therefore, he has Watandar rights in the suit lands. In order to decide the prayers made in the suit, the issue of adoption had to be decided. The issue falls within the exclusive jurisdiction of the civil court. In the subsequent proceedings before the Sub-Divisional Officer, the issue was whether Vithu was the adopted son of deceased Watandar and, therefore, having hereditary interest in any inferior village watan under Watan Abolition Act, 1958. To decide this issue, the Sub-Divisional Officer firstly has to decide the issue, whether Vithu is the adopted son of deceased Watandar. This issue is one which does not fall within the jurisdiction of the revenue court but falls within the exclusive jurisdiction of the civil court. Since the issue of adoption was already decided between the same parties by a competent civil court, the Sub-Divisional Officer cannot decide that issue and without giving any decision on that issue could not have allowed the claim of the respondent Vithu. Therefore, in our opinion, the Principles of Res-judicata would apply to the proceedings before the Sub-Divisional Officer." In a suit for injunction, the issues and the decision would be confined to possessory aspect. If the right to possession of property cannot be decided without deciding the title to the property and a person who approaches the Court, his

status itself is to be adjudicated then without declaring his status, the relief could not be granted. In earlier suit Vithu claimed his right as an adopted son. Therefore, since he did not prove the adoption, there was no subsisting right or interest over the immovable property and as such the issue on adoption was a relevant issue in 1953 suit and, therefore, the said issue which has been decided in earlier suit and which has been confirmed in the regular second appeal and the issue decided therein was whether he was an adopted heir of Watandar was binding on the parties. The similar question has to be decided by the S.D.O. to decide the claim, right or interest in respect of the hereditary office.

In Forward Construction Co. and others -vs-Prabhat Mandal (Regd.) Andheri and others and connected matters, reported in **MANU/SC/0274/1985 : AIR 1986 SC 391**, the Hon'ble Apex Court at Para-20 of its judgment, on the principle of res judicata, was pleased to observe as below: "20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to S. 11 C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and

have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force."

In Dr. Subramanian Swamy -vs- State of Tamil Nadu and others and connected matters, reported in MANU/SC/0022/2014 : AIR 2015 SC 460, the Hon'ble Apex Court was pleased to explain the scope of application of doctrine of res judicata, in Paragraphs-23, 24 and 26 of its judgment on the following lines: "23. The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged a thing judicially acted upon or decided; a thing or matter settled by judgments". "Res judicata pro veritate accipitur" is the full maxim which has, over the years, shrunk to mere "res judicata", which means that res judicata is accepted for truth. 24. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence. "interest republicae ut sit finis litium" (it concerns the State that there be an end to law suits)

and partly on the maxim "nemo debet bis vexari pro uno et eadem causa" (no man should be vexed twice over for the same cause.) Even an erroneous decision on a question of law attracts the doctrine of res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata (Vide: Shah Shivraj Gopalji v. ED-, Appakadh Ayiassa Bi and Ors., MANU/PR/0022/1949 : AIR 1949 PC 302; and Mohanlal Goenka v. Benoy Kishna Mukherjee and Ors., MANU/SC/0008/1952 : AIR 1953 SC 65).

Satyadhyan Ghosal and Ors. V. Smt. Deorajin Debi and Anr., MANU/SC/0295/1960 : AIR 1960 SC 941 explained the scope of principle of res judicata observing as under: "7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as

any higher court must in any future litigation proceed on the basis that the previous decision was correct."

TERRITORIAL JURISDICTION

In Hiralal v. Kalinath MANU/SC/0041/1961 : AIR 1962 SC 199, a person filed a suit on the original side of the High Court of Judicature at Bombay for recovering commission due to him. The matter was referred to arbitration and it resulted in an award in favour of the Plaintiff. A decree was passed in terms of the award and was eventually incorporated in a decree of the High Court. In execution proceedings, the judgment-debtor resisted it on the ground that no part of the cause of action had arisen in Bombay, and therefore, the High Court had no jurisdiction to try the cause and that all proceedings following thereon were wholly without jurisdiction and thus a nullity. Rejecting this contention, a four judge Bench of Supreme Court held thus: The objection to its [Bombay High Court] territorial jurisdiction is one which does not go to the competence of the court and can, therefore, be waived. In the instant case, when the Plaintiff obtained the leave of the Bombay High Court on the original side, under Clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the Defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. It is well settled that the

objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure.

In Harshad Chiman Lal Modi v. DLF Universal Ltd.

MANU/SC/0710/2005 : (2005) 7 SCC 791, Court held that an objection to territorial and pecuniary jurisdiction has to be taken at the earliest possible opportunity. If it is not raised at the earliest, it cannot be allowed to be taken at a subsequent stage. This Court held thus: 30. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the

cause or matter. An order passed by a court having no jurisdiction is a nullity.

In Hasham Abbas Sayyad v. Usman Abbas Sayyad MANU/SC/5541/2006 : (2007) 2 SCC 355, a two judge Bench of Court held thus: 24. We may, however, hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure, and a decree passed by a court having no jurisdiction in regard to the subject-matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with.

Mantoo Sarkar v. Oriental Insurance Co. Ltd. MANU/SC/8464/2008 : (2009) 2 SCC 244, a two judge Bench of this Court held thus: 20. A distinction, however, must be made between a jurisdiction with regard to the subject-matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the latter it would not be. It is not a case where the Tribunal had no jurisdiction in relation to the subject-matter of claim...in our opinion, the court should not have, in the absence of any finding of sufferance of any prejudice on the part of the first Respondent, entertained the appeal.

Sneh Lata Goel vs. Pushplata and Ors. MANU/SC/0048/2019
- Objection which was raised in execution in present case did not

relate to subject matter of suit. It was an objection to territorial jurisdiction which did not travel to root of or to inherent lack of jurisdiction of a civil court to entertain suit. High Court was manifestly in error in coming to conclusion that it was within jurisdiction of executing court to decide whether decree in suit for partition was passed in absence of territorial jurisdiction.

Adv - Sridhara babu N

Adv - Sridhara babu N

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CHAPTER INTERROGATORIES AND ADMISSIONS

WHAT STEPS TRIAL COURTS SHOULD ADOPT IN CIVIL CASES

In a decision reported in (2011) 8 SCC 249 in the case of (Ramrameshwari Devi and Others Vs. Nirmala Devi and Others), the Supreme Court has held:-

"52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing parties concerned appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on

merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."

WRONG CONCESSION ON A QUESTION OF LAW MADE BY A COUNSEL IS NOT BINDING ON HIS CLIENT

In the decision **UPTRON INDIA LTD. VS SHAMMI BHAN** reported in **AIR 1998 SC 1681**, it has again been reiterated that a wrong concession on a question of law made by a counsel is not binding on his client and such concession cannot constitute a just ground for a binding precedent. It was pointed out therein that if the appellant in that case had pointed out the true position, the learned single Judge would not have granted relief in favour of the respondent. It was further held that if the counsel had made an attempt to give concession inadvertently or under a mistaken impression of law, it would not be binding on the client and the same cannot any how benefit any party.

The said decision was followed again by the Hon'ble Supreme Court in the decision reported in **CENTRAL COUNCIL FOR**

RESEARCH IN AYURVEDA & SIDDHA & ANR. VS K. SANTHAKUMARI **AIR 2001 SC 2306**. In the decision U.O.I. & ORS. VS MOHANLAL LIKUMAL PUNJABI & ORS reported in **(2004) 3 SCC 628**, the Hon'ble Supreme Court had gone one step further and has held that applicability of the statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law could invariably depend upon the scope and meaning of the provisions and has got to be adjudged not on any concession; that any such concessions would have no acceptability or relevance while determining the rights and liabilities incurred or acquired in view of the axiomatic principle that there can be no estoppel against the statute.

Hon'ble Supreme Court reported in CENTRAL COUNCIL FOR RESEARCH IN AYURVEDA & SIDDHA & ANR. VS K. SANTHAKUMARI **AIR 2001 SC 2306**, it is made clear that an admission or concession by a counsel made inadvertently or under a mistaken impression of law will not only bind on his client, but also the same cannot enure to the benefit of the other party.

The Honourable Apex Court in the case of MOHD.AKRAM ANSARI VS. CHIEF ELECTION OFFICER AND OTHERS, reported in **2007(8) Supreme 581**, held thus: “ In this connection we would like to say that there is a presumption in law that a Judge deals with all the points which have been pressed before him. It often happens that in a petition or appeal several points are

taken in the memorandum of the petition or appeal, but at the time of arguments only some of these points are pressed. Naturally a Judge will deal only with the points which are pressed before him in the arguments and it will be presumed that the appellant gave up the other points, otherwise he would have dealt with them also. If a point is not mentioned in the judgment of a Court, the presumption is that that point was never pressed before the learned Judge and it was given up. However, that is a rebuttable presumption. In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an application before the same learned Judge (or Bench) which delivered the impugned judgment, and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the concerned Court to pass appropriate orders, including an order of review. However, it is not ordinarily open to the party to file an appeal and seek to argue a point which even if taken in the petition or memorandum filed before the Court below, has not been dealt with in the judgment of the Court below. The party who has this grievance must approach the same Court which passed the judgment, and urge that the other points were pressed but not dealt with.....”

WRONG CONCESSION OF A COUNSEL ON A PURE QUESTION OF LAW IS NOT BINDING UPON A PARTY

AIR 1998 S.C. 465 (Tripura Goods Transport Association v. Commissioner of Taxes), the Hon'ble Supreme Court has held as under:- "4. ... The concession made on behalf of the State counsel was against the statutory provisions and was unauthorised. It has been submitted that order passed on the basis of this erroneous concession should be recalled.

Uptron India Ltd. v. Shammit Bhan AIR 1998 SC 1681: (1998 AIR SCW 1447: 1998 Lab IC 1545: 1998 All LJ 1099) pointed out that a wrong concession on question of law made by counsel is not binding on his client and such concession cannot constitute a just ground for a binding precedent."

AIR 2006 SC 3566 (Union of India v. S.C. Parashar), the Hon'ble Supreme Court has held as under:- Before advertng to the said question we may record that wrong concession of a counsel on a pure question of law is not binding upon a party. It is furthermore trite that non-mentioning or wrong mentioning of a provision in an order may be held to be irrelevant if it is found that the requisite ingredients thereof were available on records for passing the same.

PRINCIPLES RELATED TO WRONG CONCESSION OF COUNSEL

The principles that emerge from the several decisions of supreme court are framed by madras high court division bench consisting of **HONOURABLE Mr. JUSTICE F.M.IBRAHIM KALIFULLA and THE HONOURABLE Mr. JUSTICE B.RAJENDRAN in the case**

of The Deputy Commissioner Of Income ... vs K.S.Suresh, 2009:-

- a) Any concession made by a Counsel against the statutory provisions would be unauthorised and any order based on such erroneous concession should be recalled. (AIR 1998 SC 465);
- b) A wrong concession on a question of law made by a counsel is not binding on his client. Such concession cannot constitute a just ground for a binding precedent. (AIR 1998 SC 1681);
- c) If the learned counsel has made an admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot enure to the benefit of any party;
- d) Courts are not to act on the basis of concessions but with reference to the applicable provisions;
- e) Any concession would have no acceptability or relevance while determining the rights and liabilities incurred or acquired in view of the axiomatic principle without exception, that there can be no estoppel against statute;
- f) Any wrong concession made by a counsel before the Court cannot bind the parties when statutory provisions clearly provide otherwise;
- g) A party may be allowed to revile and an Appellate Court may permit in rare and appropriate cases to resile from a concession made on a wrong appreciation of the law and had led to gross injustice though one may not call in question the very fact of making the concession as recorded in the judgment.

COURTS HAVE TO TAKE A PARTICIPATORY ROLE IN A TRIAL

The Hon'ble Supreme Court in **Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others, 2004 (4) SCC 158** observed: "The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the

witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the

truth. It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in."

AN ADMISSION MADE IN A PLEADING IS NOT TO BE TREATED IN THE SAME MANNER AS AN ADMISSION IN A DOCUMENT - OFFERING EXPLANATION IN REGARD TO AN ADMISSION OR EXPLAINING AWAY THE SAME, HOWEVER, WOULD DEPEND UPON THE NATURE AND CHARACTER THEREOF

GAUTAM SARUP VS LEELA JETLY & ORS. 2008 (7) SCC 85,

Appellant filed a suit for declaration of his title to the properties and for decree of permanent injunction. Respondent No.6 on being served with the summons appeared through MPV, Advocate. She filed a written statement admitting the averments made in the plaint. She, however, filed another written statement denying and disputing the claim of the appellant in toto. She also filed an application on 28.8.2000 for permission to take the first written statement off the records and to file another written statement on the premise that she had not engaged MPV, Advocate nor filed any written statement through him. She denied her signatures appearing on the said written statement. The said application was allowed by the trial court. Appellant filed revision wherein High Court while setting aside the order of trial court directed it to hold an enquiry as to whether the respondent no.6 ever engaged MPV, Advocate or ever signed the written statement which had been placed on record. It was directed that in the event the findings of the said enquiry go in her favour, it would be open to her to file the second written statement or the one which has been filed by her may be accepted. Pursuant thereto, enquiry was held and it was opined that respondent no.6 had, in fact, appointed the said MPV as her lawyer and filed her written statement on 30.3.2000. This order was upheld by High Court. Thereafter, Respondent no.6 filed an application for amendment which was allowed by trial Court and affirmed by High Court. Hence the present appeal. Allowing the appeal, the Court HELD: An admission made in a pleading is

not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore. A thing admitted in view of s.58 of the Indian Evidence Act need not be proved. Order VIII Rule 5 CPC provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom. A categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other. An explanation can be offered provided there is any scope therefor. A clarification may be made where the same is needed. Respondent No.6 accepted the case of the appellant in its entirety. It went to the extent of accepting the plea of the appellant that his suit, claiming half share in the property left by his father, may be decreed. Each and every contention of the plaintiff-appellant was accepted by respondent no.6. The only explanation which could be offered by her was that the purported admission had been taken from her by playing fraud on her and she, therefore, was not bound thereby. If, she

had not engaged MPV as her advocate or had not put her signature on the written statement, the purported contention contained in her written statement filed on 30.3.2000 might not constitute 'admission' in the eyes of law. In such a situation in law, she must be held to have not filed any written statement at all. It was bound to be taken off the records and substituted by a written statement which was properly and legally filed. Such a contention raised on the part of respondent No.6 having been rejected by the Trial Judge as also by the High Court, the submission that she should be permitted to explain her admissions does not and cannot arise. It is not correct to say that other respondents having denied and disputed the genuineness of the Will and an issue in that behalf having been framed, the appellant in no way shall be prejudiced if the amendment of the written statement be allowed.

ADMISSIONS HAVE TO BE CLEAR IF THEY ARE TO BE USED AGAINST THE PERSON MAKING THEM. ADMISSIONS ARE SUBSTANTIVE EVIDENCE BY THEMSELVES

Bharat Singh & Anr. vs. Bhagirathi [(1966) 1 SCR 606], wherein Court held: "Admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of ss. 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether

that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions."

LITIGANT CANNOT SUFFER FOR THE FAULT OF HIS COUNSEL

In **Rafiq and Anr. v. Munshilal and Anr. AIR 1981 SC 140**; and **Smt. Lachi and Ors. v. Director of Land Records and Ors. AIR 1984 SC 41** , while dealing with a similar issue held that a litigant cannot suffer for the fault of his counsel. The Hon'ble Supreme Court in the former case observed as under: What is the fault of the party who having done everything in his power expected of him, would suffer because of the default of his advocate.... The problem that agitates us is whether it is proper that a party should suffer for the inaction, deliberate omission, or misdemeanour of his agent.... We cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of hearing of the appeal, the personal appearance of the party is not only not

required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.

THE GENERAL IMPRESSION WHICH THE PROFESSION GIVES TODAY IS THAT THE ELEMENT OF SERVICE IS DISAPPEARING AND THE PROFESSION IS BEING COMMERCIALISED.

In **Tahil Ram vs Ramchand AIR 1993 SC 1182**, the Supreme Court by quoting the observations of Justice Vimadalal, J. of the Bombay High Court. "Learned Judge observed as under: This Motion disclosed a sorry state of affairs in regard to which, unfortunately, I have had my suspicions in several matters while sitting in chambers on the Original Side. It appears that there are certain firms of attorneys who enter into arrangements with advocates under which they file appearances for persons who are the direct clients of these advocates. In such cases, the entire carriage of the proceedings is left to the advocate, and he is briefed at the hearing by the attorney merely as a matter of form, even the fees being recovered directly by the advocate from his client. From the point of view of professional ethics, it is, in my opinion, not proper for an attorney to lend his name in that manner and such practices amount to an abuse of the Dual

System prevailing on the Original Side of this Court. Once an attorney files his appearance on the Original Side of this Court on behalf of a party, it is his duty and his obligation to attend to the matter, both on the clients as well as the court. It is not difficult for everybody concerned with the Original Side to realise which particular firms of attorneys indulge in these practices frequently, and some of them even regularly.” “We entirely agree with the sentiments expressed by the Learned Judge. Though the observations were made by the Learned Judge almost two decades ago, the same are apposite even today. Legal profession must give an introspection to itself. The general impression which the profession gives today is that the element of service is disappearing and the profession is being commercialised. It is for the members of the Bar to act and take positive steps to remove this impression before it is too late.”

LAW DOES NOT COMPEL A MAN TO DO WHAT HE CANNOT POSSIBLY PERFORM - ACT OF COURT SHALL PREJUDICE NO MAN

Shaikh Salim Haji Abdul Khayumsab v. Kumar and another ((2006) 1 SCC 46), In the facts and circumstances of the case, the maxim of equity, namely, *actus curiae neminem gravabit* an act of court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, *lex non cogit ad impossibilia* the law does not compel a man to do what he cannot possibly perform. The law itself and its

administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in *Raj Kumar Dey v. Tarapada Dey* (1987 (4) SCC 398), *Gursharan Singh v. New Delhi Municipal Committee* (1996 (2) SCC 459) and *Mohammad Gazi v. State of M.P. and others* (2000(4) SCC 342).

TO DECREE ON THE ADMISSION IT SHOULD BE CLEAR AND UNAMBIGUOUS

It is settled law that for a decree to be passed on admission, the admission should be clear and unambiguous. *Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha, (HUF) and Anr.* MANU/SC/0355/2010 : (2010) 6 SCC 601

ADMISSION IS NOT CONCLUSIVE PROOF BUT IT ACTS AS ESTOPPEL

Under Section 17 of the Indian Evidence Act, an admission is defined as a statement oral or documentary, which suggests any inference as to any fact and issue or relevant fact. An admission is a voluntary acknowledgment by a party or some one identified with him in legal interest of the existence of certain facts which are in issue or relevant to an issue in the case. Admission unless explained furnishes the best evidence, but admission as a whole

has to be looked into for arriving at a conclusion. To have value and an effect as stated, an admission has to be clear, certain and definite and not ambiguous, vague or confused. Statement to operate as an admission must be clear in its meaning. Admission is not conclusive proof of the matter admitted, though it may in certain circumstances operate as estoppel. (See *K.S. Srinivasan v. Union of India*, AIR 1958 SC 419).

It has also been held In the case of *Nagubai Ammal and others v. B.Shama Rao and others*, AIR 1956 SC 593 that an admission is not a conclusive as to the truth of a matter stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made.

ADMISSION AND COURT DISCRETION ON SUCH ADMISSIONS

Hon'ble Apex Court in *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati* reported in AIR 1965 Supreme Court 364. An excerpt from it would run thus: "22. It is true that in divorce case under the Divorce Act of 1869, the Court usually does not decide merely on the basis of the admissions of the parties. This is a rule of prudence and not a requirement of law. That is because parties might make collusive statements admitting allegations against each other in order to gain the common object that both desire for personal reasons. A decision on such admissions would be against public policy and is bound to affect not only the parties to the proceedings but also their issues, if any, and the general interest of the society. Where, however, there is no room

for supposing that parties are colluding, there is no reason why admissions of parties should not be treated as evidence just as they are treated in other civil proceedings. The provisions of the Evidence Act and the Code of Civil Procedure provide for Courts accepting the admissions made by parties and requiring no further proof in support of the facts admitted.

23. Section 58 of the Evidence Act inter alia provides that no fact need be proved to any proceeding which the parties thereto or their agents agree to admit at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading. Rule 5 of O. VIII, C.P.C., provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability.

24. Both these provisions, however, vest discretion in the Court to require any fact so admitted to be proved otherwise than by such admission. Rule 6 of O. XII of the Code allows a party to apply to the Court at any stage of a suit for such judgment or order as upon the admissions of fact made either on the pleadings or otherwise he may be entitled to, and empowers the Court to make such order or give such judgment on the application as it may think just. There is therefore no good reason for the view that the Court cannot act upon the admissions of the parties in proceedings under the Act.

25. Section 23 of the Act requires the Court to be satisfied on certain matters before it is to pass a decree. The satisfaction of the Court is to be on the matter on record as it is on that matter that it has to conclude whether a certain fact has been proved or not. The satisfaction can be based on the admissions of the parties. It can be based on the evidence, oral or documentary, led in the case. The evidence may be direct or circumstantial". (emphasis supplied)

ADMISSION HOW FAR RELIABLE AS EVIDENCE

Sita Ram Bhau Patil v. Ramchandra Nago Patil (dead) by LRs. and another, AIR 1977 SC 1712:

One of the issue for determination before Hon'ble the Supreme Court in this case was "Admission when can be used against the person making it". In para 16 of the judgment it was held as under:- "16. If admission is proved and if it is thereafter to be used against the party who has made it the question comes within the provisions of Section 145 of the Evidence Act. The provisions in the Indian Evidence Act that 'admission is not conclusive proof' are to be considered in regard to two features of evidence. First, what weight is to be attached to an admission? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, "it is sound that if a witness is

under cross examination on oath, he should be given an opportunity if the document are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. This is a general salutary and intelligible rule" (see *Bal Gangadhar Tilak v. Shrinivas Pandit* 42 Indian Appeals 135 at page 147). The Judicial Committee in that case said, "it has to be observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed". The general principle is that before any person is to be faced with any statement he should be given an opportunity to see that statement and to answer the same. The specific statutory provision is contained in Section 145 of the Indian Evidence Act that "A witness may be cross examined as to previous statements made by him in writing or reduced into writing, and relevant matters in question, without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him". Therefore, a mere proof of admission, after the person whose admission is alleged to be has concluded his evidence, will be of no avail and cannot be utilised against him."

Udham Singh v. Ram Singh and another, (2007) 15 SCC 529:

Hon'ble the Supreme Court has held that no doubt admission is the best evidence against the person who is said to have made it, but it can always be explained. One whose previous statement is to be treated as an admission or it is sought to be used, he has to

be confronted with such a statement. The admission has to be clear, unambiguous and proved conclusively. It is a question which needs to be considered as to what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission.

P.C. Purushotham Reddiar v. S. Perumal [(1972) 1 SCC 9] for the proposition that once a document is properly admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence.

Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. (Vide: Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors., AIR 1960 SC

100; Basant Singh v. Janki Singh & Ors., AIR 1967 SC 341; Sita Ram Bhau Patil v. Ramchandra Nago Patil, AIR 1977 SC 1712; Sushil Kumar v. Rakesh Kumar, AIR 2004 SC 230; United Indian Insurance Co Ltd. v. Samir Chandra Choudhary., (2005) 5 SCC 784; Charanjit lal Mehra & Ors v. Kamal Saroj Mahajan & Anr., AIR 2005 SC 2765; and Udham Singh v. Ram Singh & Anr., (2007) 15 SCC 529.)

In Nagubai Ammal & Ors. v. B.Shama Rao & Ors., AIR 1956 SC 593, this Court held that admission made by a party is admissible and best evidence, unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the judgment in *Slatterie v. Pooley*, (1840) 6 M & W 664, wherein it had been observed “What a party himself admits to be true, may reasonably be presumed to be so.”

In AIR 1986 SUPREME Court 1509, Dudh Nath Pandey v. Suresh Chandra Bhattasali the Apex Court had held that the admission must be taken as a whole and it is not permissible to rely on a part of admission ignoring the other.

In AIR 1971 Supreme Court 1542, Chikkam Koteswara Rao v. Chikkam Subbarao and Ors. the Apex Court had held that the admissions must be clear in their meaning holding that before right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear cut and conclusive.

Relying upon the law laid down in *Nagubai Ammal v. B. Sharma Rao*, MANU/SC/0089/1956 : AIR 1956 SC 593, *Rahmanul Hasan v. Zahurul Hasan*, MANU/UP/0380/1946 : AIR 1947 All. 281, *Kishori Lal v. Mt. Chaltibai*, MANU/SC/0145/1958 : AIR 1959 SC 504, *Mohd Imam Ali Khan v. Sardar Ali Khan*, 25 Ind. Apps. 161 (PC), Allahabad High Court held in **Devi Shankar and others v. Deputy Director of Consolidation and others**, MANU/UP/ 0752/1984 : 1985 (11) ALR 172 (para 7, 10 & 18) as under: "7. It is well-settled that an admission is not conclusive as to the truth in the matter stated therein. It is only a piece of evidence, the weight to be attached to it must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue so long as the person to whom it is made has not acted upon it to his detriment and it may become conclusive by way of estoppel.

10. It was further held in para 20 of the report that: "If the facts are once ascertained, presumption arising from conduct cannot establish a right which the facts themselves disprove."

18.An admission of a party contained in a compromise or in any other deed or document, can no doubt be taken to be a substantive piece of evidence but the same, has got to be scrutinised and considered on merits alongwith other evidence led by the parties in support of their respective cases. If the admission is shown to be factually incorrect on the consideration of evidence on record, the claim of the party relying on it cannot be upheld merely on its basis because an erroneous and untrue

admission cannot confer title on a person if he has no title in the property in question."

In Mohd. Kafeel and another v. State of U.P. and another, MANU/UP/0559/1996 : 1997 (3) ALR 579 (para 10), Court relied upon a judgment of Hon'ble Supreme Court in Banarasi Das v. Kansi Ram, MANU/SC/0302/1962 : AIR 1963 SC 1165 (Para 12), and a judgment of Privy Council in Society Banque v. Girdhari, MANU/PR/0018/1940 : AIR 1940 PC 90, and held that an admission would bind the parties only in so far as facts are concerned but not in so far as it relates to a question of law. An erroneous admission on a point of law is not an admission of a thing, so as to make the admission a matter of estoppel and the Court is not precluded from deciding the rights of parties on a true view of the law.

STATEMENTS MADE VENDORS ARE BINDING ON SUCH PARTIES AS THEIR ADMISSION

The High Court of Jammu and Kashmir in the case of Hardatt Sharma v. Jaikishen Shamlal & Sons reported AIR 1983 J & K-page No. 36, held as under: ...True, Under Section 18 of Evidence Act, statements made by persons from whom the parties to the

suit have derived their interest in the subject matter of the suit, are binding on such parties as their admission, nevertheless, before the same may bind them, it has further to be shown that the statements were made by those persons during the continuance of their interest in the subject matter, and obviously so, because, if would be highly unjust and improper to divest a person of his right in the property, lawfully acquired by him from another, on the basis of the latter's admission after his own interest in the property has ceased to exist.

EVERY TRIAL IS VOYAGE OF DISCOVERY IN WHICH TRUTH IS THE QUEST

Section 165 of the Evidence Act, 1872 empowers the Court to ask questions relevant, irrelevant, related or unrelated to the case to the party to ascertain the true facts. The party may not answer the question but it is not permitted to tell the Court that the question put to him is irrelevant or the facts the court wants to ascertain are not in issue. Exercise of such a power is necessary for the reason that the judgment of the court is to be based on relevant facts which have been duly proved. A court in any case cannot admit illegal or inadmissible evidence for basing its decision. It is an extraordinary power conferred upon the court to elicit the truth and to act in the interest of justice. A wide discretion has been conferred on the court to act as the exigencies of justice require. Thus, in order to discover or obtain proper proof of the relevant facts, the court can ask the question to the parties concerned at any time and in any form. "Every trial

is voyage of discovery in which truth is the quest". Therefore, power is to be exercised with an object to subserve the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the court can put questions to the parties, except those which fall within exceptions contained in the said provision itself. **(Vide : Jamatraj Kewalji Govani Vs. State of Maharashtra, AIR 1968 SC 178; and Zahira Habibulla H. Sheikh & Anr. Vs. State of Gujarat & Ors. (2004) 4 SCC 158.**

Cheedella Radhakrishna Sharma and Ors. vs. Radhakrishnamurthy and Ors. : MANU/AP/2751 /2014 -

"..... it is relevant to state the settled propositions of law, not only on proof and presumptions on existence of joint family, joint family property, partition or division in status, sufficiency of nucleus for subsequent acquisitions and whether subsequent acquisitions are separate or part of joint family, but also on appreciation of pleadings and evidence including with reference to the documents, in particular wills, entries in books of accounts, boundary recitals of documents, evidencing value of the same with reference to facts and circumstances, solemn duty of Court in ascertaining truth from trial of suit

"14.(a).(i). Judging is not merely a job, but a way of life based a spiritual wealth that includes by obligation of an impartial search for truth. The greatest legal engine is ever invented for discovery of truth from the well-known saying that-Trial is a voyage in which trust is the quest-reiterated in by the

Apex Court in- Ritesh Tiwari v. State of UP
MANU/SC/0742/2010 : 2010(10)SCC-677.

14(a).(ii). Appreciation of evidence is thus part of the process in search for truth. Even in case of conflict between stability and truth, truth is preferable as truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation and justice. The entire judicial system has been created only to find out the truth as Truth alone triumphs, not falsehood. Through truth, the divine path is spread out by which the sages, whose desires have been completely fulfilled, reach where that supreme treasure of truth resides. Thus, it is the bounden duty of Judges in the journey of trial/enquiry to discover truth by application of procedural and adjectival law to decide the substantial rights -Vide decision-Maria M.S. Fernandes v. Erasmo J. De Sequerio MANU/SC/0225/2012 : AIR 2012 SC 1727 : 2012(3)ALT-SC-14.

14(a).(iii). The Law of Evidence is as old as the human civilization. Truth implies reality in two kinds viz., (1). Paramartha known as eternal truth-(with which we are now not concerned) & (2). Yathartha known as factual truth-(with which we are now concerned), is to discern with the testimony of immediate perception in the here and now world, where subject-object duality is persistent.

14(a).(iv). Though, BHAVABUTHI a Sanskrit poet in his "UTTARA RAMA CHARITAM" said that unlike from saintly men, it is difficult to expect absolute truth from an ordinary being, however the court is to presume a witness on oath speaks truth and then appreciate his truthfulness or otherwise with reference

to the material and surrounding circumstances. That is the great task of a Judge in appreciation of evidence to ascertain truth where lies among the disputants.

14(a).(v). NARADA, a saintly poet gave attention to many issues concerning the Indian philosophy and Hindu mythology in this regard and he summarised the rules of evidence in a nutshell that when any dispute arises between parties, he states that the party must check whether he has any document in his favour to substantiate his claim. If no document is available, the party must produce the direct witness who can testify on his behalf with regard to the facts under dispute. When neither a document nor a direct witness is available, third preference shall be given to inferences, which can be drawn by a prudent man with regard to existence or non-existence of relevant facts with reference to other facts and circumstances to draw necessary inferences. If with the help of above statement of NARADA, we venture to analyse the Indian Evidence Act, it is nothing but extraction and elaboration of above principle as stated by NARADA, that even under the Evidence Act, the court will prefer the documentary Evidence (subject to its probative value, requirement of stamp and registration and if not original on foundation for any secondary evidence) over oral evidence (subject to credibility of the witness) and it will prefer primary/direct-oral evidence from that of indirect oral evidence/circumstantial evidence, other than hearsay, subject to exceptions on admissibility of hearsay evidence.

14(a).(vi). Appreciation of Evidence is a judicial function and there shall not be any element of arbitrariness in appreciating the

evidence. The logic behind appreciation of evidence is - A Judge who know nothing about the cause outside the four wall of the Court, but for what is brought to his notice by pleadings and evidence in proof of facts under controversy, can reasons and decide well. It is also in fact the logic behind the bane of justice. It is apt to refer the recent expression of the Apex Court in *Om Prakash Chautala v. Kanwar Bhan* MANU/SC/0075/2014 : 2014 (5)SCC-417- at Paras -19&20 that, A Judge should abandon his passion. He must constantly remind himself that he has a singular master "duty to truth" and such truth is to be arrived at with the legal parameters. No heroism, no rhetorics. A Judgement has rhetorics but the said rhetoric has to be dressed with reason and must be in accord with legal principles, otherwise may likely to cause injustice.

14(a).(vii). The Rules of Evidence laid down in the Evidence Act have thereby special value to a judge, furnishing him with solid, systematic and well considered tests to arrive at truth. If the Evidence Act has no application, one has to necessarily follow the incidence of the Evidence Act as a law of evidence; else it is a difficult task to a judge to arrive at truth, for no systematic and definite alternative guidance to arrive at truth from over adjectival laws.

14(a).(viii). The whole exercise is by trial and in civil proceedings the object is to ascertain some right or property or status or right of one party and liability of other, to some form of relief by judgment which must not be based on surmises or conjectures, but upon facts relevant and duly proved by correct application of law.

14.(b).(i). The functions of a Court of Justice are twofold viz., (1) to ascertain the existence or non-existence of certain facts and the method used to bring them before court of law (evidence) & (2) to apply substantive law to the ascertained facts and declare the rights, liabilities and duties etc. of parties in so far as they are effected by such facts. Unless the facts be correctly ascertained, however accurate be the application of substantive law, the result cannot be free from error. The Rules, which guide and assist in appreciation of evidence that are contained in the Indian Evidence Act thereby, are of great value.

14(b).(ii). Evidence Act is the foundation for proof. Appreciation of evidence to mean evaluation, assessment and estimation etc. of the evidence (oral, documentary, direct, circumstantial or real or combination of some or all - placed on record) judiciously with reference to factual and legal aspects (including legal fictions, burden of proof, presumptions, benefit of doubt, general/special exceptions, legal bars like Bar of limitation, Double jeopardy/Resjudicata and Estoppel etc.,) of a given case as to any fact in issue/for consideration is proved or not proved or disproved (to hold it as proved or not proved or disproved-it also depends upon the nature of the lis)- to say:-it is the proof by preponderance of probabilities-(the requirement-in cases of civil nature and for defence of accused in criminal cases or it is the proof beyond reasonable doubt (not beyond doubt)- (the requirement-in criminal cases) or it is in between (the requirement-in Election disputes to establish allegations of fraud and misconduct etc., and disputes relating to legitimacy and also in title suits-where the defence is denial of plaintiffs title) as the

case may be, as per the requirement of Law from the nature of the case.

14(c)(i). Thus substantial rights are to be ascertained with reference to adjectival law-(rules of evidence and rules of procedure). The adjectival law facilitates the results to be obtained since the rights conferred on persons by substantive law will reach them through the process of rules of evidence and procedure.

14(c)(ii). As per M.C. Shetalwad, the Civil Procedural Law is based on the theory that there must be a full disclosure by each party of his case to the other, that rival contentions (in the pleadings) must be reduced as quickly as possible to the form of clear & precise points or issues for decision and there must be a prompt adjudication by the Court on those points. Justice delays not so much due to defects in procedure but by faulty application.

14(d). Coming to scope of pleadings need not embody law and legal terminology concerned; it is also the well-settled proposition of law on pleadings from S.B. Noronal v. Prem Kundi AIR 1989 SC 193 that, pleadings are not statutes and legalism is not verbatim. Common sense should not be kept in cold storage, when pleadings are construed. In Ram Sarup Gupta v. Bishur Narain Inter College MANU/SC/0043/1987 : AIR 1987 SC 1242 referring to the expression of the Constitution Bench in Bhagwati Prasad v. Chandra maul MANU/SC/0335/1965 : AIR 1966 SC 735 also of Sheodhari Rai v. Suraj Prasad Singh MANU/SC/0058/1950 : AIR 1954 SC 458 and Trojan & Company v. R.M.N. Nagappa Chettiar MANU/SC/0005/1953 :

AIR 1953 SC 235 that it is not desirable to place undue emphasis on form, instead substance of pleadings should be considered; as the pleadings should receive a liberal and not pedantic approach as meant to ascertain the substance and not form, it only requires the opposite party to know. It is well settled that in the absence of pleadings; any evidence produced by parties generally cannot be considered. It is also equally settled that, no party should be permitted to travel beyond its pleadings with the object and purpose to enable the opposite party to know the case it has to meet. Keeping this object and purpose, though generally no plea, no evidence can be looked into and for no issue, no finding can be given; it is not always the static principle from the fact that even a plea not made specifically from deficiency in pleadings, but if covered by implication and evidence let in and parties know the case, it can be looked into and even to give finding no issue framed is of no bar to formulate a point and decide. The Apex Court in Bhagavathi Prasad (supra) by referring to Balmukund v. Dalu (03) 25 ALL 498 FB observed that it is undesirable and inexpedient to lay down any general rule in respect of such a situation (of evidence adduced fully by both sides on the question of title, a decree based on title can be given or not, for no plea), held that if Court is satisfied that the ground on which reliance is placed by one or other of the parties was, in substance, at issue between them, and both of them have had opportunity to lead evidence at the trial, the formal requirement of the pleading can be relaxed and the same is the proposition laid down in Ponnaipillai v. Pannai MANU/TN/0136/1946 : AIR 1947 Madras 282.

14(e). On Burden of proof and onus probandi with reference to pleadings and appreciation; it was held by the Apex Court in *Kalwa Devadatham V Union of India* MANU/SC/0106/1963 : AIR 1964 SC 880 that the question of onus probandi is certainly important in the early stages of the case. It may also assume importance where no evidence at all is let in on the question in dispute by either side. In such a contingency, the party on whom the onus lies to prove a certain fact must fail. Where, however, evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place and truth or otherwise of the case must always be adjudged on the evidence led by the parties, burden of proof in such matters, loses its importance and pales its significance- also vide *A. Raghavamma V. Chenchamma* MANU/SC/0250/1963 : AIR 1964 SC 136 & *Smt. Premalatha V. Arathanth Kumar Jain*. MANU/SC/0400/1972 : AIR 1973 SC 626 Thus, what is necessary is party shall aware of the plea and let in evidence for the Court to give finding from the hearing covering the lis, but not outside the scope, irrespective of who led what evidence by make use of entire evidence on record. It was also held in some of the expressions that even alternative remedy not pleaded if entitled, Court can grant it where it is appropriate to do so. In *Balasankar v. Charity Commissioner, Gujarat* MANU/SC/0034/1995 : AIR 1995 SC 167 at para-19-it was similarly held that, burden of proof pales significance when both parties adduced evidence and it is the duty of the court to appreciate the entire evidence adduced by both sides in deciding the lis; also on the aspect as to party proved in possession of best

evidence is bound to produce the same to throw light on the lis and to unfold any truth and thereby cannot take shelter on the abstract doctrine of burden of proof saying burden not on him to prove by filing the material document or producing the material witness-as laid down in NIC v. Jugal Kishore MANU/SC/0341/1988 : AIR 1988 SC 719(B) and Lakhan Sao v. Dharamu Chaudhary MANU/SC/0598/1991 : 1991 (3) SCC 331. Vide also Karnesh Kumar v. State of UttarPradesh MANU/SC/0051/1968 : AIR 1968 SC 1403 & Gopalakrishnaji ketkar v. Mahammad Haji Lathief MANU/SC/0168/1969 : AIR 1968 SC 1413, which followed the privy council's expression in Murugesan Pillai v. G.S.P. Sannadhi MANU/PR/0053/1916 : AIR 1917 PC 6 at 8 that "a practice has grown in Indian procedure those in possession of important document or information lying by, trusting to the abstract doctrine of onus of proof, and failing, accordingly, to furnish to the Courts best material for its decision. With regard to third parties this may be right enough- they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition, held that if a party in possession of best evidence which throws light on the issue in controversy withholds it, the Court ought to draw an adverse inference against him from non filing of the material document or non producing of the material witness, notwithstanding the fact that onus of proof not lie on him or because he was not called upon to

produce it, by relying on the abstract doctrine of onus of proof". Same is relied upon in Sri Venkateshwara Oil Company v. Guduru Jalaja Reddy MANU/AP/0759/2001 : 2002(1) ALD 182 DB

14(f)(i). Coming to appreciation of evidence and interference by superior Court concerned; it was also laid down in this regard by the three Judge Bench of Apex Court in Iswar Prasad Misra v. Mohammad Isa MANU/SC/0040/1962 : AIR 1963 SC 1728 - that, Judicial experience shows that in adjudicating upon rival claims brought before the Courts, it is not always easy to decide where truth lies. Evidence is adduced by the respective parties in support of the conflicting contentions and circumstances are similarly pressed into service. In such a case, it is no doubt, the duty of the judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities and decide within which exactly the truth lies. The impression formed by the judge about the character of evidence will ultimately determine the conclusion which he reaches.

14(f)(ii). In fact, it could be unsafe to overlook the fact that all judicial minds may not react in the same way to said evidence and it is not unusually that evidence which appears to be respectable and trustworthy to one judge may not appears to be so to the other. That explains why in some cases courts of appeal reverse conclusions of facts recorded by trial Courts on its appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case acts as a sobering factor and leads to the use of temperate language in recording judicial conclusions. Judicial approach in such a cases will

always be based on the consciousness that one may make a mistake; that is why the use of unduly strong words in expressing conclusion---- in our opinion, the use of such intemperate language may in some cases tend to show either lack of experience in judicial matters or an absence of judicial poise and balance--. Judges are not computers and thus bound to call in aid their experience in life and test with probabilities-*vide* - *Chaturbhuj Pande v. Collector, Rayagarh* MANU/SC/0377/1968 : AIR 1969 SC 255.

14(f)(iii). It is also held that in assessing the value to be attached to oral evidence, particularly as Judge of fact, it is open to the appellate Judges to test the evidence placed before them on the basis of probabilities, irrespective of lack of effective or no cross examination by opposite party, Court is not bound to rely, if probabilities show otherwise, but for to consider in the facts if so to construe as admission from facts deposed supported by plea not disputed in cross examination as a rule of essential justice. *vide* - *A.E.G. Carapiet v. A.Y. Derderian* MANU/WB/0074/1961 : AIR 1961 Calcutta 359.

14(f)(iv). Rules of justice require that the party cross examining must put the crucial and important part of his case to the witness of the other side in his cross-examination and if no question is put to the witness in the cross examination with regard to a certain fact challenging the same, then such fact has to be presumed to be true. No doubt for that conclusion it is to be seen, whether there is any pleading in this regard and in the absence of which, merely because the attention of the said stray sentence of the witness, inadvertently not drawn attention while

cross-examination to put a question on it by itself does not amount to admission but for to read the entire evidence as a whole to cull out such is the admission or not from non-testing by cross-examination of said sentence-vide- Shri Ravinder Kumar Sharma v. RFA 757/2002 16 State of Assam MANU/SC/0561/1999 : 1999 SAR(Civil) 837.

14(f)(v). Thus, in appreciation of evidence, Judges are bound to call into aid their experience and knowledge of human affairs, depending upon facts and circumstances of each case and regard had to the credibility of the witness, probative value of the documents, lapse of time if any in proof of the events and occurrence for drawing inferences, from consistency to the material on record to draw wherever required the necessary inferences and conclusions from the broad probabilities and preponderances from the overall view of entire case to judge as to any fact is proved or not proved or disproved.

14(g). Coming to the proof of facts out of the facts in issue to the extent of relevant facts concerned, it depends upon the nature of the lis and in civil matters proof is always by preponderance of probabilities. In RVEE Gounder v. RVS Temple 2003(8)-Supreme Today-194 at 196 the Apex Court held that, in civil cases the proof is by preponderance of probabilities for including in suits relating to ejectment or declaration of title or for possession; and the onus shifts from initial burden on the plaintiffs if able to establish from preponderance of probabilities for entitlement, on the defendant to rebut the same including with specific claim on their part if any. It is in explaining the earlier propositions of law that, in a suit for ejectment, plaintiff

shall win or lose his case only on his own strength principle, since it does not mean the onus of proof is static and always on the plaintiff or it shall never shifts on the defendant even if the plaintiff is able to establish his case from preponderance of the probability as to what is meant by proved, not proved or disproved required for the above expressions with reference to Section 3 of Evidence Act without going into the other components of "may presume, shall presume and conclusive proof", from the very definition, proved and disproved to say not proved is when it is neither proved nor disproved. It requires considering the matters before the Court on any fact for either believes it to exist or does not exist (which is by direct evidence), or considers its existence so probable that a prudent man ought, under the circumstance of a particular case to act upon supposition that it exists or does not exist (which is by circumstantial evidence). At paras-25-29 of the judgment, the Apex Court clearly held that in a suit for ejectment once plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence there of, the burden of proof lies on the plaintiff shall be held to have been discharged so as to prove the plaintiff's title. What is meant by proved, not proved or disproved with reference to Section 3 of the Evidence Act was discussed in detail by the division bench of this Court in N.K. Somani v. Punam Somani MANU/AP/0700/1998 : 1998(5)-ALD-349. It is also needful to note the difference between legal burden(as per pleadings) and evidentiary burden-how it shifts during trial under Sections 101-103 of the Evidence Act- vide Vasu v. Syed

Yason S Quadri MANU/AP/0217/1987 : AIR 1987 AP 139(FB) that was quoted with approval by the Apex Court in Bharat B & D.M. Co. v. Amin Chand Pyaralal MANU/SC/0123/1999 : AIR 1999 SC 1008 and in Hiten P. Dalal v. Bratindranath Benarji MANU/SC/0359/2001 : AIR 2001 SC 3897

14(h). It is also important to appreciate a fact with reference to the context in which it is stated, rather taking it as conclusive. It is relevant to recollect as part of appreciation of evidence with reference to the pleadings as part of discovering truth, the well laid down expression of the three judge bench of the Apex Court in Mrs. Rukhmabai v. Lala Laxminarayana MANU/SC/0186/1959 : AIR 1960 SC 335 at para-19 by relying upon the Privy council's expression Alluri Venkatapathi Raju v. Danthuluri Venkata Narasimha Raju MANU/PR/0023/1936 : AIR 1936 PC 264 that, it sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and there it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue.

14(i). Court is not confined merely to look into the form of the transaction between the parties concerned; the well laid down expression of the Apex Court in Provident Investment Company Limited v. Court of I.T. AIR 1954 Bombay 95 at para-3 speaks in this regard that, Court is not confined merely to look into the form of the transaction between the parties (in giving effect to the legal rights and obligations there under), but the true legal position that arises out of it (by ignoring the form to ascertain real nature) in which the transaction was embodied and for that

the Court may even look at the surrounding circumstances in construing the fact covered by oral statement or document, with reference to the substance and subject to the limitations for admissibility of oral over documentary evidence under Sections 91 and 92 of the Evidence Act.

14(j). Coming to appreciation of evidence in special reference to appeals and in moulding or grant of reliefs; it was held by the Apex Court in *Banarsi v. Ramphal* MANU/SC/0147/2003 : AIR 2003 SC 1989=2003(9) SCC 606 and *Pannalal v. State of Bombay* MANU/SC/0240/1963 : AIR 1963 SC 1516 : 1964(1) SCR 980 (5 judges bench) that, 1st appellate Court must re-appreciate (appreciate afresh) the entire evidence in giving its findings supported by reasons as to decide the lis and therefrom to find how far the decision of the trial court on any of its findings and conclusions are correct or incorrect, including for confirmation or reversal of said findings of the trial Court and the appellate Court for that is conferred with powers of wide amplitude under Order XLI Rules 22,24 and 33 so as to do complete justice between the parties and such power is unfettered to make whatever order it thinks fit, even between corespondents, for ordinarily cross-objections between co-respondents they do not prefer. It is also as per *Santhosh Hazari v. Purushottam Tiwari*, MANU/SC/0091/2001 : AIR-2001-SC-965 *Madan Lal v. Yoga Bai* MANU/SC/0161/2003 : (2003(5)-SCC-89) and *Harihar Prasad Singh v. Balmiki Prasad Singh* MANU/SC/0008/1974 : 1975(1)SCC 212, that in Civil appeals, particularly in first appeal, the appreciation of evidence is at large like appreciation of evidence in a suit, more particularly from Order XLI, Rules 33 &

24 C.P.C. The appellate court got powers under Order 41 Rules 33 & 24 CPC not only to pass an order or decree that the trial court ought to have passed, but also while sitting in appeal against, irrespective of the appeal filed is challenging even part of the order or decree of the trial court, to grant any further decree or order within the scope of relief, though not beyond, as the case may require within the facts and circumstances, which include subsequent events to take note of in so moulding the reliefs-Vide- S. Nasser Ahmed (supra). In P.V. Karuppanan v. Pandari Sundara Raja Ayyar MANU/TN/0147/1939 : AIR-1940-Madras-71 - it was held that even suit is filed for declaration of title and possession and plaintiff entitled to possession from anterior possession, the relief can be granted even no plea specifically asking for the relief.

14(k). Burden of appellant/cross-objector concerned; no doubt, the burden of showing that the judgment or even a finding therein under a challenge in appeal is wrong or incorrect either wholly or in part lies on the appellant and same is also the proposition in the course of the cross-objections as the cross-objectors are at par with appellants so far as their contentions in the cross-objections concerned, in the course of the cross-objections in shifting the burden on them, from hearing the main appeal. Coming to the powers of the 1st appellate Court in this regard concerned, more particularly from Order XLI, Rules 33 and 24 C.P.C. and from several expressions of the Apex Court including - Koksingh v. Deokabai MANU/SC/0408/1975 : AIR-1976-SC-634; Gaisi Ram v. Ramji Lal MANU/SC/0286/1969 : AIR-1969-SC-1144 and Madan Lal (supra); the 1st appellate court

is competent to grant relief if finds appropriate on any facts though that was not granted by the trial Court in rendering complete justice and prevent to the extent possible scope for further litigation and to give finality to the lis. But as held in Banarsi and Pannalal (supra) there are three limitations on the said power-Viz., it must not be to the prejudice of persons not parties (Rule 24), if given up a claim not to revive on its own and if part of the lis in the claim for relief not appealed (by cross objections or otherwise) and made final, Court cannot grant relief on the un-appealed portion and the relief to be granted may be lesser to the plea, but not higher or totally outside the pleadings and evidence MANU/SC/0005/1953 : AIR 1953 SC 235. Among the defendants to the suit, generally they won't prefer appeal and it is not a bar to decide their claims inter se in spite of non-filing of appeal or cross-objections with any specific plea. For granting such reliefs it is within the power of the appellate Court, subject to the rider that but for permitting on one ground or other to substantiate the relief granted by trial court, it cannot grant more relief than what was granted by the trial Court for want of cross-objections-vide decisions: Ranjana Prakash v. Divisional Manager MANU/SC/0897/2011 : 2011(8) Scale 240 where categorically held that but for to substantiate the quantum on one ground or other from impugning any findings in that regard or by interference by this Court within its appellate power under Order XLI Rule 33 CPC, the respondent to the appeal cannot ask for reducing or increasing the quantum in the absence of cross-objections or independent appeal; Oriental Insurance Company Limited v. R. Swaminathan 2006 ACJ 1398 following the earlier

expression of the Apex Court in Banarsi (supra) in the same line; in Banarsi (supra) referring to Pannalal (supra), Rameshwar Prasad v. Shambharilal Jagannad (three judge Bench), MANU/SC/0203/1963 : 1964(3) SCR 549 Harihar Prasad Singh v. Balmiki Prasad Singh MANU/SC/0008/1974 : 1975(1) SCC 212 holding that normally a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so, no relief should ordinarily be given to him even under Order XLI Rule 33 CPC. But there are well recognized exceptions to this Rule. One is where as a result of interference in favour of the appellant; it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is, where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible, but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is possibility that there might come into operation at the same time and with reference to the same subject matter two decrees which are inconsistent and contradictory. This, however, is not an exhaustive enumeration of the class of cases in which Courts would interfere under Order XLI Rule 33 of CPC. Such an enumeration neither possible nor even desirable. In *Nirmala Balaghosh v. Balaichandghosh* (three judge Bench) MANU/SC/0346/1965 : 1965(3) SCR 550 - it was held that Order XLI Rule 33 is undoubtedly expressed in terms

which are wide but it has to be applied with discretion, and to cases where interference in favour of appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. ---The Rule does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from----by failure of the respondent to prefer appeal or to take cross-objections, the respondent has allowed the part of the trial Court's decree to achieve a finality which was adverse to him. While dismissing the appeal, modifying the decree in favour of the appeal-respondent in the absence of cross-appeal or cross-objections is interference by the appellate Court that has reduced the appellant's to a situation worse than in what they would have been if they had not been appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of the law committed by the lower Court(appellate) - in laying down the principle therefrom in Banarsi (supra) that in an appeal filed by the defendant laying challenge to the grant of a smaller relief, the plaintiff as a respondent cannot seek a higher relief if he had not filed an appeal on his own or had not taken any cross-objection and as such held by relying on it in R.Swaminathan (supra) that in the appeal filed by the insurer the claimant neither filed cross-objections nor appealed independently and thereby not entitled to claim more than what the tribunal awarded. It is needless to say the 1st appellate Court if desires to reverse the judgment and

decree of lower Court; it should discuss the findings and set aside those which are unsustainable either on fact or on law."

Maria Margarida Sequeira Fernandes and others -vs- Erasmo Jack De Sequeira (Dead) through LRs., reported in [MANU/SC/ 0225/2012 : (2012) 5 SCC 370], wherein at Paragraph-33 of its judgment, the Hon'ble Apex Court was pleased to observe as below: "The truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth."

In Dalip Singh -vs- State of Uttar Pradesh and others, reported in [MANU/SC/1886/2009 : (2010) 2 SCC 114] the Hon'ble Apex Court was pleased to observe as below: "For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (non-violence). Mahavir, Goutam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, the post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the

quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

A. Shanmugam -vs- Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, Represented by its President, reported in MANU/SC/0336/2012 : AIR 2012 SC 2010, wherein the Hon'ble Apex Court was pleased to observe as below: "21. This case demonstrates widely prevalent state of affairs where litigants raise disputes and cause litigation and then obstruct the progress of the case only because they stand to gain by doing so. It is a matter of common experience that the Court's otherwise scarce resources are spent in dealing with non-deserving cases and unfortunately those who were waiting in the queue for justice in genuine cases usually suffer. This case is a typical example of delayed administration of civil justice in our Courts. A small suit, where the appellant was directed to be evicted from the premises in 1994, took 17 years before the matter was decided by the High Court. Unscrupulous litigants

are encouraged to file frivolous cases to take undue advantage of the judicial system. 24. The entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties. Truth is the basis of justice delivery system. This Court in *Dalip Singh v. State of U.P. and others* MANU/SC/1886/2009 : (2010) 2 SCC 114 : (AIR 2010 SC (Supp) 116 : 2010 AIR SCW 50) observed that truth constitutes an integral part of the justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system."

Padmawati -vs- Harijan Sewak Sangh and others, reported in [(2012) 6 SCC 460], and referred to Paragraph-10 of the said judgment, wherein the Hon'ble Apex Court was pleased to observe as below: "The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving a no-risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where the court finds that using the courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the courts. One of the aims of

every judicial system has to be to discourage unjust enrichment using the courts as a tool. The costs imposed by the courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

FAILURE TO PROVE THE DEFENCE DOES NOT AMOUNT TO AN ADMISSION

In L.I.C of India & Anr v. Ram Pal Singh Bisen, (2010) 4 SCC 491, this Court held that "failure to prove the defence does not amount to an admission, nor does it reverse or discharge the burden of proof of the plaintiff."

JUDGMENT ON ADMISSION

Himani Alloys Limited vs. Tata Steel Limited (2011) 15 SCC 273 Court has held that the discretion conferred under Order XII Rule 6 of CPC is to be exercised judiciously, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant. Para 11 of the judgment read as under:- "11. It is true that a judgment can be

given on an “admission” contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear “admission” which can be acted upon. (See also *Uttam Singh Duggal & Co. Ltd. v. United Bank of India* [(2000) 7 SCC 120] , *Karam Kapahi v. Lal Chand Public Charitable Trust* (2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262] and *Jeevan Diesels and Electricals Ltd. v. Jasbir Singh Chadha* [(2010) 6 SCC 601 : (2010) 2 SCC (Civ) 745] .)

S.M. Asif vs. Virender Kumar Bajaj (2015) 9 SCC 287 Court has held that the power under Order XII Rule 6 of CPC is discretionary and cannot be claimed as a right. It is further held in the aforesaid case that where the defendants have raised objections, which go to root of the case, it would not be appropriate to exercise discretion under Order XII Rule 6 of CPC. Para 8 of the judgment read as under:- “8. The words in Order 12 Rule 6 CPC “may” and “make such order ...” show that the power

under Order 12 Rule 6 CPC is discretionary and cannot be claimed as a matter of right. Judgment on admission is not a matter of right and rather is a matter of discretion of the court. Where the defendants have raised objections which go to the root of the case, it would not be appropriate to exercise the discretion under Order 12 Rule 6 CPC. The said rule is an enabling provision which confers discretion on the court in delivering a quick judgment on admission and to the extent of the claim admitted by one of the parties of his opponent's claim."

Balraj Taneja and another vs. Sunil Madan and another (1999) 8 SCC 396 while considering the scope of Order VIII Rule 10 and Order XII Rule 6 of CPC, this Court has held that the court is not to act blindly upon the admission of a fact made by the defendant in the written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court.

Further even de-hors the admission it is well settled that mutation in the name of one or two co-owners of the property does not oust the title of the remaining co-owners. It is trite law that mutation of a property in the revenue record does not create or extinguish title, nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. [See: 1996 (6) SCC 223 Sawarni (Smt.) vs. Inder Kaur (Smt.) & Ors.]. Even in 2015 (16) SCC 689, Municipal Corporation, Aurangabad through its Commissioner vs. State of Maharashtra & Anr. Supreme Court

held that mutation does not confer any right and title in favour of anyone or other, nor cancellation of mutation extinguishes the right and title of the rightful owner.

STRAY ADMISSION OR STATEMENT OF WITNESS SHALL NOT BE BASIS FOR COURT DECISION OTHER EFFECTS OF MATERIALS TO BE TAKEN

Muniramaiah vs. D. Ramaswamy : MANU/ KA/ 1460 /2012 - M/s. Mahesh Centre and Another -vs- People Charity Fund by its Trustees (MANU/KA/7105/2007 : ILR 2007 Kar 4344) to contend that stray admission or the statements of the witness in the course of evidence shall not be the criteria or the basis for the decision but it is the duty of the Court to consider the evidence in a case as a whole and its finding should depend upon the cumulative effect of the entire oral and documentary evidence. It is while keeping in view the position of law enunciated on that aspect, the materials available on record and the admissions have been noticed insofar as the indication of the location of the property of the plaintiff and the defendants being in the vicinity. However, the question which arise here is as to whether such admissions alone are sufficient to hold that the plaintiff is in actual physical possession of the extent of 100 ft. X 38 ft and what is the effect of the documents in its entirety.

CHAPTER LIMITATION

LAW OF LIMITATION GOVERNING PARTITION SUITS

The law of limitation governing suit for partition of immovable property stands reiterated in **Nanak Chand and Ors. Vs. Chander Kishore and Ors., AIR 1982 Delhi 520**, in the following words:- “Separation from the joint family involving severance in status with all its legal consequences is quite distinct from the de facto division into specific shares of the joint property. One is a matter of individual decision, the desire to

cover himself and enjoy his hitherto undefined and unspecified share separately from the others; whilst the other a natural resultant from his decision is the division and separation of his share which may be arrived at either by private agreement or by arbitration appointed by the parties or in the last resort by the court. One should not confuse the severance of status, with the allotment of shares. Therefore, a division in status takes place when a member expresses his intention to become separate unequivocally and unambiguously, and makes it known to other members of the family from whom he seeks to separate. The process of communication may vary in the circumstances of each particular case. The filing of a suit for partition is clear expression of such an intention. A decree may be necessary for working out the results of severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not”.....

“partition in its larger sense, no doubt, therefore, consists in a division by which the share of each co-parcener with respect to all or any of the joint property is. fixed, and once the shares are defined, the partition in the sense of severance or disruption of the family is complete, but after 'the shares are so ascertained', the parties might elect either to have a partition of their shares by metes and bounds' or continue to live together and 'enjoy their property in common as before.' Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it. The joint ownership turns into possession and enjoyment in common until the physical partition

takes place according to the shares standing at the date of severance of status. It is no more in doubt that a suit for such physical partition is governed by Article 120(113 new) as was held in *Raghunath Das v. Gokal Chand and another*, Air 1958 Sc 829” "The crucial question in such cases is when a right to sue accrues, there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or, at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted :Where there are successive invasions or denials of a right, the right to sue under Article 120 (Article 113) accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such right, however, ineffective or innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether the threat effectively invades or jeopardizes the said right The right to partition sprang into existence in this case when the notice of severance and demand for partition was served, but right to sue did not accrue until the defendant infringed or threatened to infringe that right. The plaintiffs had averred that it was in 1968 and afterwards that the defendant began to infringe the tenancy-in-common and deny their right to share. Such a pleas could be defeated by a specific denial and by proof that the right had been lost on account of ouster and exclusion that is adverse possession for more than the statutory period that is for not less

than 12 years. That is the effect of Article 65 and section 27 of the Limitation Act. We are, therefore, of the view that the suit is not barred under Article 113.

Mohammad Baqar and Others v. Naim-un-Nisa Bibi and Others MANU/SC/0125/1955 : AIR 1956 SC 548; As under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period. There can be no question of ouster, if there is participation in the profits to any degree (para 3).

In a suit for partition the facts found were that the plaintiffs were minors at the time of their father's death, that they continued to live with their brothers in the same house down to the year 1918, that thereafter they went to reside with their husbands but that they continued to draw from the family chest for all expenses. It was not until 1933 when the defendants executed a waqf deed that there was any denial of the title of the plaintiffs, and down to that date, they had been in enjoyment of the properties. The evidence showed that what the plaintiffs received was not merely maintenance but was of the same character as the receipts by the defendants themselves from the estate during that period. Held that the defendants' possession was not adverse to the plaintiffs (para 7)".

P. Lakshmi Reddy v. L. Lakshmi Reddy
MANU/SC/0083/1956 : AIR 1957 SC 314 : 1957 SCR 195,;

The ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario. The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. But it is well-settled that in order to establish adverse possession of one-co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heirs' title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. The burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession ".

K.L. Shivananja Murthy vs. K.R. Rajamma and Ors.:
MANU/KA/3668/2014 In the Limitation Act, 1963, by J.N. Mallik, M.A., LL.B., Second Edition, January 1983, published by

S.C. Sarkar and Sons (Private) Limited, Calcutta, at page 218, it is mentioned as under: "Co-sharers and adverse possession: In case of co-sharers or co-owners, possession of one is the possession of all. To bar the right of others, there must be denial of their right to their knowledge and exclusion from possession and ouster for the statutory period of 12 years. Ouster must be clearly established. Hostile animus without any overt hostile acts to call attention of other co-sharers intended to be ousted will not do. Co-sharer's possession to be adverse must be one 'nec vi, nec clam, nec precario', adequate in continuity in publicity and in extent. To displace lawful title, evidence must be adduced of open assertion of hostile title coupled with exclusive possession and enjoyment of one to the knowledge of the others so as to constitute ouster. Possession according to arrangement between co-sharers is not adverse. Mere non-participation in rents and profits unaccompanied by other circumstances indicating a denial of title does not amount to ouster. Any secret hostile animus is not sufficient. There must be open assertion of hostile title coupled with exclusive possession and enjoyment to the knowledge of others. Receiver's possession cannot be used by a successful party to establish adverse possession as no suit could be brought during Receiver's possession and there would be no actual possession with requisite animus".

CONDONATION OF DELAY

Hon'ble Apex Court in the case of **Basawaraj and Another v. Special Land Acquisition Officer**, reported in

MANU/SC/0850/2013 : (2013) 14 SCC 81 wherein it is categorically held that the discretion to condone the delay has to be exercised by the Courts judiciously based on the facts and circumstances of each case. "Sufficient cause" cannot be liberally interpreted if negligence, inaction or lack of bonafides is attributed to the party. Even though limitation may harshly affect right of a party but it has to be applied with all its rigour when prescribed by statute. Courts have no choice but to give effect to the same. Result flowing from statutory provision is never an evil. Inconvenience is not a ground for interpreting a statute. Courts do not have power to extend the period of limitation based on equitable grounds.

DIRECTING THAT ON FAILURE OF THE DEPOSIT BEING MADE WITHIN THE TIME LIMITED THE CASE SHOULD STAND DISMISSED

Bhutnath Das & Ors. v. Sahadeb Chandra Panja AIR 1962 Cal. 485 :

“4. ... The real question, therefore, is whether in a case like this where an order has been made for the payment of certain money within a certain time for the purpose of getting specific performance and at the same time an order has also been made that if the money is not paid the suit will stand dismissed, the court retains jurisdiction. Though not without hesitation, I have reached the conclusion that in such a case it will be unrealistic and unjust to say that the court retains jurisdiction. Whether the

court has retained jurisdiction or not will, in my view, depend very much on the substance of the directions given..... Where..... the court makes also an order that if the amount is not deposited within the time specified the suit will stand dismissed, I find it difficult to agree that the court retains any jurisdiction whatsoever.

6.the trial court lost jurisdiction in the suit as soon as it made the order directing the payment within a certain time and further directing that on failure of the deposit being made within the time limited the case should stand dismissed.”

SECTION 148 – EXTENSION OF 30 DAYS LIMIT WHEN FOR REASONS BEYOND CONTROL OF PARTY PERMITTED.

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The upper limit of 30 days fixed in Section 148 of the Code cannot take away the inherent power of the Court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of Court. The rigid operation of the Section would lead to absurdity. Section 151 has, therefore, to be allowed to fully operate. Extension beyond the maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for the reasons beyond the control of the party. However, Section 148 does not apply to cases to which the Limitation Act, 1963 is applicable. There can be many cases where non-grant

of extension beyond 30 days would amount to failure of justice. The object of the Code is not to promote failure of justice. Section 148, therefore, deserves to be read down to mean that where sufficient cause exists or events are beyond the control of a party, the Court would have inherent power to extend time beyond 30 days.

THE PERIOD OF SEVEN DAYS MENTIONED IN ORDER IX RULE 5 IS CLEARLY DIRECTORY – INSPECTION OF DOCUMENTS CAN BE ALLOWED AFTER ISSUES
SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The stipulation in **Rule 15 of Order XI** confining the inspection of documents 'at or before the settlement of issues' instead of 'at any time' is also nothing but directory. It does not mean that the inspection cannot be allowed after the settlement of issues.

UNENDING PERIOD FOR LAUNCHING THE REMEDY MAY LEAD TO UNENDING UNCERTAINTY AND CONSEQUENTIAL ANARCHY

Supreme Court in *Mangu Ram v. Municipal Corpn. of Delhi*, (1976) 1 SCC 392 and *Mukri Gopalan v. Cheppilat Puthanpuraiyil Aboobacker* (1995 (5) SCC 5) observed that an express mention in the special law is necessary only for an exclusion. The Supreme Court in the subsequent decisions by placing reliance on the Three Judge Bench decision in *Hukumdev*

Narain Yadav v. L.N. Mishra, (1974) 2 SCC 133 made the position clear that in case the provisions of the Limitation Act were excluded by necessary implication in spite of the absence of an express provision, the provisions of the Limitation Act cannot be extended to enlarge the time prescribed under the Special Statutes. In fact in Hukumdev Narain Yadav, the Court held that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. The Court observed that if on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred by the Limitation Act cannot be called in aid to supplement the provisions of the Act. It was also observed that even in case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would still be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation. The Supreme Court in Union of India v. Popular Construction Co. (2001) 8 SCC 470 held that the words "exclusion" also includes "exclusion by necessary implication"..... In Nasiruddin v. Sita Ram Agarwal, (2003) 2 SCC 577, the Supreme Court held that the Court can condone the delay only when the statute confers such a power on the Court and not otherwise. The Supreme Court in Hukumdev Narain Yadav case (1974 (2) SCC 133) and Popular Construction Company case (2001 (8) SCC 470)

indicated the test to determine the applicability of Section 29(2) of the Limitation Act. The Court was of the view that the applicability of the provisions of the Limitation Act has to be considered taking into account the provisions of the Special law and not by placing reliance on the provisions of the Limitation Act..... Supreme Court in Popat and Kotecha Property v. State Bank of India Staff Assn., (2005) 7 SCC 510, indicated the object and principles underlying the provisions of Limitation Act. The Supreme Court said: "9. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So, a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). The idea is that every legal remedy must be kept alive for legislatively fixed period of time.

LIMITATION ACTS APPLY ONLY TO PROCEEDINGS BEFORE COURT OR EXPRESSLY MADE APPLICABLE IN STATUTES

The Supreme Court in *Mardia Chemicals Ltd. v. Union of India* (2004(4) SCC 311) while analysing the provisions of the SARFAESI Act observed that Civil Court jurisdiction is not altogether barred and to a very limited extent jurisdiction of Civil Court can also be invoked. This also is an indication that the Tribunal is not a Civil Court empowered to adjudicate complicated questions of fact and law.

The Supreme Court in *Bharat Bank Ltd., v. Employees of Bharat Bank Ltd., Delhi and others* (AIR 1950 SC 188) held that although the Labour Court may have all the trappings of a Court, still it is not a Court.

The Supreme Court in *Sushila Devi v. Ramanandan Prasad*, (1976) 1 SCC 361, found that the Collector notified under Section 2(a) of the Kosi Area (Restoration of Lands to Raiyats) Act 1951 was given exclusive powers to decide questions regarding restoration of holding. Section 15 of the Act vested him with certain specific powers under the Code of Civil Procedure. Still the Supreme Court held that the Collector was not a Court and as such Section 5 of the Limitation Act has no application to a proceeding before him.

WHETHER LIMITATION ACT IS APPLICABLE TO A PROCEEDING BEFORE DEBT RECOVERY TRIBUNAL

The Supreme Court in *Transcore v. Union of India and another* (2008) 1 SCC 125 observed that the Debts Recovery Tribunal is a

tribunal, it is the creature of the statute but it has no inherent power which exists in the civil courts. The Supreme Court in *Sakuru v. Tanaji*, (AIR 1985 SC 1279 = (1985) 3 SCC 590), by following the earlier decisions held that the provisions of the Limitation Act would apply only to proceedings in "Court" and not to appeals or applications before bodies other than Courts. The Supreme Court said : "3.It is well settled by the decisions of this Court in *town Municipal Council v. Presiding Officer, Labour Court, Hubli* (1970) 1 SCR 51 = (AIR 1969 SC 1335), *Nityananda M. Joshi v. Life Insurance Corporation of India* (1970) 1 SCR 36 = (AIR 1970 SC 209) and *Sushila Devi v. Ramanandan Prasad* (1976) 2 SCR 945 = (AIR 1976 SC 177) that the provisions of the Limitation Act, 1963 apply only to proceedings in courts and not to appeals or applications before bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a court, the Limitation Act, as such, had no applicability to the proceedings before him. But even in such a situation the relevant special statute may contain an express provision conferring on the Appellate Authority, such as the Collector, the power to extend the prescribed period of limitation on sufficient cause being shown by laying down that the provisions of Section 5 of the Limitation Act shall be applicable to such proceedings."

THE APPLICABILITY OF THE PROVISIONS OF THE LIMITATION ACT, THEREFORE, IS TO BE JUDGED NOT FROM THE TERMS OF THE LIMITATION ACT BUT BY THE PROVISIONS OF THE SPECIAL ACT

Supreme Court in Commissioner of Customs v. Hongo India Private Limited, (2009) 5 SCC 791, observed: “35. It was contended before us that the words expressly excluded would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act

DOCTRINE OF ESTOPPEL

In Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited, (2011) 10 SCC 420, Court considered a large number of judgments on the issue of estoppels and held as under: “A party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.....The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.”

The Rajasthan State Industrial Development and Investment Corporation and another -vs- Diamond and Gem Development Corporation Ltd., and another, reported in AIR 2003 SC 1241, with respect to Section 115 of Indian Evidence Act, 1872, and Order VI Rule 2 of Code of Civil Procedure, 1908, and on the principles of approbate and reprobate in respect of estoppel by election, the Hon'ble Apex Court was pleased to observe at Para-9 and Para-10 as below: "9. A party cannot be permitted to "blow

hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience. 10. Thus, it is evident that the doctrine of election is based on the rule of estoppel-the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."

In Shri Surendra Nayak -vs- A.M. Mohammed Shafi, reported in [MANU/KA/2090/2016 : 2016 (4) KCCR 3606], a Co-ordinate Bench of this Court while discussing on estoppel under Section 115 of Indian Evidence Act, was pleased to observe at Para-11 and Para-12 of its order as below: "11. Estoppel is a collective name given to a group of legal doctrines whereby a person is prevented from making assertions that are contradictory to their prior position on certain matters before the Court; thereby the person is said to be "estopped". Estoppel may operate by way of preventing someone from asserting a particular fact in Court, or in exercising a right, or in bringing a claim. Black's Law Dictionary defines "estoppel" as "a bar that prevents

one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." 12. Judicial estoppel is said to be parcel of doctrine of equitable estoppel. Judicial estoppel binds a party to his/her previous judicial declaration, such as allegations contained in a lawsuit, complaint, written statement, or testimony given under oath. The object of judicial estoppel is to preserve the integrity of the Courts, and to uphold the sanctity of the oath. Under judicial estoppel a party to a litigation cannot be permitted to take contradictory stand and to change its position from the previous litigation to the subsequent one. For, a litigant cannot be permitted to take a Court out for a ride by his shifting stand."

LIMITATION RUN FROM THE DATE OF THE KNOWLEDGE

Justice K.L. Manjunath, J. in the case of **Leelavathi vs M. Neelakanta Naidu, Reported in ILR 2006 KAR 4637, 2006 (6) KarLJ 617**if any document is registered behind the back of the true owner in a clandestine manner, owner of a property is not expected to go before the Sub-Register' s Office and verify whether any third party has executed a document in respect of his property to a third party. In other words, owner of the property cannot keep a watch or stand before the Sub-Register like a Watch-dog to verify whether any parson has executed any document conveying his property to a third party. From reading of Article 59, the Court has to hold that the limitation run from

the date of the knowledge. Therefore, in order to find out the actual date of knowledge, the evidence is required to be recorded by the Trial Court as it is a mixed question of fact and law. The date of knowledge is a question of fact and without there being an evidence, the Trial Court was not justified in dismissing the suit as barred by limitation.

In Md. Noorul Hoda v. Bibi Raifunnisa and Ors. reported in (MANU/SC/1414/1996 : 1996 (7) SCC 767), Court held that Article 59 of the Limitation Act would be applicable if a person affected is a party to a decree or an instrument or a contract which was questioned by initiation of a suit. Article 59 would apply to set aside the decrees, instruments or contracts between the parties inter se. However, in the case of a person claiming title through a party to the decree or instrument or contract who seeks to avoid the instrument, contract or decree by a specific declaration, the starting point of limitation Under Article 59 would be the date of knowledge of the fraud and/or illegality which renders the decree and/or instrument and/or other document void.

In Prem Singh and Ors. v. Birbal and Ors. Reported in MANU/SC/8139/2006 : 2006 (5) SCC 353, Court held that when a document is valid, no question arises of its cancellation; when a document is void, initiating a decree for setting aside, the same would not be necessary as the same is non est in the eye of law as it would be a nullity. Article 59 of the Limitation Act deals only when relief is claimed on the ground of fraud,

coercion, undue influence, mistake, etc. to avoid a voidable transaction. Article 59 is attracted where fraud, coercion, undue influence, mistake etc. have to be proved. It would not apply to instruments which are presumptively invalid.

PLEA OF LIMITATION OR PLEA OF RES JUDICATA IS A PLEA OF LAW

Court in the case of Pandurang Dhondi Chougule v. Maruti Hari Jadhav MANU/SC/0033/1965 : 1966 SC 153, while dealing with the question of jurisdiction, observed that a plea of limitation or plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceeding. The Bench held: 10. The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction Under Section 115, it is not competent to the High Court to correct errors of fact however gross they may, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As Clauses (a), (b) and (e) of Section 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can

be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court Under Section 115.

Case of Manick Chandra Nandy v. Debdas Nandy MANU/SC/0285/1985 : (1986) 1 SCC 512, Court, while considering the nature and scope of High Court's revisional jurisdiction in a case where a plea was raised that the application Under Order IX Rule 13 was barred by limitation, held that a plea of limitation concerns the jurisdiction of the court which tries a proceeding for a finding on this plea in favour of the party raising it would oust the jurisdiction of the court.

National Thermal Power Corporation Ltd. v. Siemens Atkeingesellschaft MANU/SC/1113/2007 : 2007 (4) SCC 451, Court considering the similar question under the Arbitration and Conciliation Act held as under: 17. In the larger sense, any

refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim. In *Pandurang Dhoni Chougule v. Maruti Hari Jadhav* this Court observed that: (AIR p. 155, para 10) It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code.

LIMITATION GOES TO THE VERY ROOT OF THE COURT'S JURISDICTION

Kamlesh Babu v. Lajpat Rai Sharma MANU/SC/2257/2008 : (2008) 12 SCC 577, the matter came to this Court when the trial court dismissed the suit on issues other than the issue of limitation. The Bench held: 23. The reasoning behind the said proposition is that certain questions relating to the jurisdiction of a court, including limitation, goes to the very root of the court's jurisdiction to entertain and decide a matter, as otherwise, the decision rendered without jurisdiction will be a nullity. However, we are not required to elaborate on the said proposition,

inasmuch as in the instant case such a plea had been raised and decided by the trial court but was not reversed by the first appellate court or the High Court while reversing the decision of the trial court on the issues framed in the suit. We, therefore, have no hesitation in setting aside the judgment and decree of the High Court and to remand the suit to the first appellate court to decide the limited question as to whether the suit was barred by limitation as found by the trial court. Needless to say, if the suit is found to be so barred, the appeal is to be dismissed. If the suit is not found to be time-barred, the decision of the first appellate court on the other issues shall not be disturbed.

LIMITATION, BEING A MIXED QUESTION OF LAW AND FACT IS TO BE DECIDED ALONG WITH OTHER ISSUES

Ramesh B. Desai v. Bipin Vadilal Mehta
MANU/SC/2996/2006 : (2006) 5 SCC 638, for the proposition that a plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. In our considered opinion, in the aforesaid decision this Court was considering the provision of Order XIV Rule 2, Code of Civil Procedure. While interpreting the provision of Order XIV Rule 2, this Court was of the view that the issue on limitation, being a mixed question of law and fact is to be decided along with other issues as contemplated Under Order XIV, Rule 2, Code of Civil Procedure. As discussed above, Section 9A of Maharashtra

Amendment Act makes a complete departure from the procedure provided Under Order 14, Rule 2, Code of Civil Procedure. Section 9A mandates the Court to decide the jurisdiction of the Court before proceeding with the suit and granting interim relief by way of injunction.

SUIT FOR CANCELLATION OF TRANSACTION AND LIMITATION

2009(6) SCC 160 (Abdul Rahim and others vs. SK.Abdul Zabar and Others) “19. A suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act. The suit, therefore, should have been filed within a period of three years from the date of the knowledge of the fact that the transaction which according to the plaintiff was void or voidable had taken place. The suit having not been filed within a period of three years, the suit has rightly been held to be barred by limitation.”

1996(7) SCC 767 (Noorul Hoda vs. Bibi Raifunnisa) 6. "..... The starting point of limitation is the date of knowledge of the alleged fraud. When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. It would thus be clear that

the word 'person' in Section 31 of the Specific Relief Act is wide enough to encompass a person seeking derivative title from his seller. It would, therefore, be clear that if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decrees set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him."

SUIT FILED BEYOND LIMITATION IS BARRED UNDER LAW

Court in **Prem Singh and Ors. v. Birbal and Ors.**, [2006] 5 SCC 353, "Article 59 (Limitation Act) would be attracted when coercion, undue influence, misappropriation or fraud which the plaintiff asserts is required to be proved. Article 59 would apply to the case of such instruments. If a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. Here, the plaintiff did not either sue within 12 years of the deed or within 3 years of attaining majority. Therefore, the suit was rightly held to be barred by limitation by the trial court."

IT IS BOUNDEN DUTY OF COURT TO SEE QUESTION OF LIMITATION

Siddalingaiah vs. H.K. Kariappa 2008 (5) KCCR 3546 : MANU/KA/0799/2008 - Section 3 of the Limitation Act, 1963, provides that every suit instituted, appeal preferred, and an application made after the prescribed period shall be dismissed although limitation has not be set up as a defense. It is the bounded duty of the court to see the question of limitation. There is no bar to raise the question of limitation even at the Second Appeal. Plea of suit being barred by Limitation and question of bar of limitation to suit be raised even without pleading. In the present case the declaration was sought for almost after 40 years from the date of the Adoption Deed and hence held the suit was hopelessly barred by time.

WAIVER OF RIGHTS

State of Assam v. Bhaskar Jyoti Sarma and others [MANU/SC/1082/2014 : (2015) 5 SCC 321], wherein it was held in paragraph 16 that- "The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is whether such grievance could be made long after the alleged violation of Section¹ 10(5). If actual physical possession was taken over from the erstwhile landowner on 7.12.1991 as is alleged in the present case any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. If the owner did no do so, forcible

¹ Urban land ceiling act 1976 which requires notice to take possession under that provision.

taking over of possession would acquire legitimacy by sheer lapse of time. In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would give a licence to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure."....."The fact that the dispossession was without a notice under Section 10(5) in the present case will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because the erstwhile owner that is the father of the Respondents had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so. Hence, the order of the Single Judge of the High Court is restored."

In Volume 45, Halsbury's Laws (4th Edition), paragraph 1269, the meaning of the word "waiver" has been described as follows:-
 "1269. Waiver is the abandonment of a right, and thus is a defence against its subsequent enforcement. Waiver may be express or, where there is knowledge of the right, may be implied from conduct which is inconsistent with the continuance of the right. A mere statement of an intention not to insist on a right does not suffice in the absence of consideration; but a deliberate election not to insist on full rights, although made without first

obtaining full disclosure of material facts, and to come to a settlement on that basis, will be binding."

In **Inderpreet Singh Kahlon and others v. State of Punjab and others** [MANU/SC/2433/2006 : (2006) 11 SCC 356], the doctrine of waiver was considered in detail. In paragraph 132, it was held- "In Vol.16, Halsbury's Laws (4th Edn.), para 1471, the term "waiver" has been described in the following words: "1471. Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on its is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right, without need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver." It was further held that "It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly,

then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration."

M/s. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh [MANU/SC/0336/1978 : AIR 1979 SC 621], argued that the waiver is a question of fact and it must be properly pleaded and proved. It has also been argued that no plea of waiver can be allowed to be raised, unless it is pleaded and the factual foundation for it is laid in the pleadings. It was held: "It is elementary that waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings. Here the plea of waiver was not taken by the State Government in the affidavit filed on its behalf in reply to the writ petition, nor was it indicated even vaguely in such affidavit. It was raised for the first time at the hearing of the writ petition."It was further held "Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be "an intentional act with knowledge". There can be no waiver unless the person who is said to have waived is fully informed as to his

right and with full knowledge of such right, he intentionally abandons it."

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CHAPTER AMENDMENT

AMENDMENT CAN BE ALLOWED AT APPEAL STAGE

The Hon'ble Supreme Court in the case of MAHILA RAMKALI DEVI AND OTHERS v. NANDRAM reported in MANU/SC/0614/2015 : AIR 2015 SC 2270 has held that the amendment of the pleadings can be permitted at the appellate stage. It is held therein that there is no prohibition against an Appellate Court permitting an amendment at the appellate stage merely because the necessary material is not already before the Court.

EFFECT OF AMENDMENT ON EXISTING RIGHTS AND PAST TRANSACTION

The Hon'ble Supreme Court in the decision reported in (2006) 2 SCC 740 S.L.Srinivasa Jute Twine Mills (P) Ltd V. Union of India and another has from para 12 onwards gone into the question as

to what is the effect of amendment on the existing rights. The Supreme Court in the relevant paragraphs referred to various earlier judgments -

- 1.AIR 1971 SC 1193 Jayantilal Amrathlal V. Union of India.
- 2.AIR 1977 SC 552 Govind Das V. ITO.
- 3.AIR 1951 SC 128 - Keshavan Madhava Menon V. State of Bombay.
- 4.AIR 1927 PC 242 Delhi Cloth & General Mills Co. Ltd V. CIT.
- 5.AIR 1965 SC 1970 Amireddi Rajagopala Rao V. Amireddi Sitharamamma.
- 6.(1974) 1 SCC 19 State of J&K V. Triloki Nath Khosa
- 7.(1997) 6 SCC 623 Chairman, Railway Board V. C.R.Rangadhamaiah.

In all the judgments above referred to the principle laid down is that retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability or attaches a new disability in respect of transactions already past and it must be presumed to be intended not to have a retrospective effect and all statutes other than those which are merely declaratory or which relate to

matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to effect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment.

AMENDMENT CAN BE ALLOWED EVEN AT EXECUTION STAGE 2005 SC

Three-Judge Bench decision of Supreme Court in **Sajjan Kumar vs. Ram Kishan [2005 (13) SCC 89]**. In this decision the proposed amendment related to correction of the description of the suit premises in the plaint. The amendment was sought on the plea that the description of the property given in the rent note itself was incorrect and the same description was repeated in the plaint and there would be complications at the stage of execution to avoid which the description of the suit premises as given in the plaint needed to be corrected. Prayer for amendment was opposed by the defendant-respondent on the principal ground that although the defendant had taken the plea in the written statement itself that the suit premises were not correctly described, yet the plaintiff- appellant proceeded with the trial of the suit and did not take care to seek the amendment at an early stage. The trial court rejected the prayer for amendment and the High Court dismissed the civil revision against the order of the trial court. Allowing the prayer for amendment Supreme Court in paragraph 5 of the decision observed as follows : “Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial court, while rejecting

the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of the execution in the event of the plaintiff-appellant succeeding in the suit.”

MERIT OF THE AMENDMENT IS HARDLY A RELEVANT CONSIDERATION 2008 SC

Usha Devi v. Rijwan Ahmad and Others AIR 2008 SC 1147 it was held as follows: "As to the submissions made on behalf of the respondents that the amendment will render the suit non-maintainable because it would not only materially change the suit property but also change the cause of action it has only to be pointed out that in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and it will be open to the defendants-respondents to raise their

objection in regard to the amended plaint by making any corresponding amendments in their written statement."

FACTORS TO BE DEALT WITH WHILE DEALING AMENDMENT APPLICATION 2009 SC

The Supreme Court, in **Revajeetu Builders and Developers v. Narayanaswamy And Sons And Others, (2009) 10 SCC 84**, observed in para 63 as under: "Factors to be taken into consideration while dealing with applications for amendments-

63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment-

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
- (2) Whether the application for amendment is bona fide or mala fide?
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and,
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application. (These are some of the important factors which may be kept in mind while dealing with application

filed under Order VI Rule 17. These are only illustrative and not exhaustive.)"

ORDINARILY, THE RIGHTS AND OBLIGATIONS OF THE PARTIES ARE TO BE WORKED OUT WITH REFERENCE TO THE DATE OF INSTITUTION OF THE SUIT 2008 SC

Mohanakumaran Nair vs. Vijayakumaran Nair, reported in AIR 2008 SC 213 "Ordinarily, the rights and obligations of the parties are to be worked out with reference to the date of institution of the suit. See Jindal Vijayanagar Steel (JSW Steel Ltd.) Vs Jindal Praxair Oxygen Company Ltd. [2006(8)SCALE668] Determination in regard to maintainability of the suit, it is trite, must be made with reference to the date of the institution of the suit. If a cause of action arises at a later date, a fresh suit may lie but that would not mean that the suit which was not maintainable on the date of its institution, unless an exceptional case is made out therefor can be held to have been validly instituted. Discretion, as is well known, cannot be exercised, arbitrarily or capriciously. It must be exercised in accordance with law. When there exists a statute, the question of exercise of jurisdiction which would be contrary to the provisions of the statute would not arise."

AMENDMENT APPLICATION AFTER COMMENCEMENT OF TRIAL -TEST OF DUE DELIGENCE 2008 SC

Chander Kanta Bansal vs. Rajinder Singh Anand, reported in 2008 (5) SCC 117 "It makes it clear that after the commencement of trial, no application for amendment shall be

allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial."

REAL TEST FOR ALLOWING AMENDMENT APPLICATION IS WHETHER REAL CONTROVERSY BETWEEN THE PARTIES MAY BE RESOLVED 2009 SC

Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626, at para 5: "5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So

far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment.”

**AMENDMENT CAN BE ALLOWED AT ANY STAGE – PROVIDED
2008 SC**

North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (dead) by LRS, (2008) 8 SCC 511, at para16: “16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings.”

In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil AIR 1957 SC 363, which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b)

of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.”

Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, at paras 15 & 16: “15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.”

The Honourable Supreme Court in the case of **Vidyabai and others vs. Padmalatha and another in 2009(2) SCC 409** held as follows:- “it is the primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, Proviso appended to Order 6 Rule 17 of the Code restricts the power of the Court. It

puts an embargo on exercise of its jurisdiction. The Court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the Plaint.”

In the judgment reported in 2008(14) SCC 364, in the matter of Rajkumar (Dead) through Lrs. vs. S.K.Shrwagi and company Private Ltd and other, the Honourable Supreme Court held that “in case of amendments, after the commencement of trial, particularly after the completion of evidence, the question of prejudice to the opposite party may arise and in such an event, it is incumbent on the part of the Court to satisfy the conditions prescribed in the proviso to Order 6 Rule 17 CPC and if the parties are able to satisfy the Court that in spite of the due diligence they could not raise the issue before the commencement of trial and the court is satisfied with their explanation, amendment can be allowed even after the commencement of trial.”

Estralla Rubber vs. Dass Estate (P) Ltd. [(2001) 8 SCC 97], Court held that even there was some admissions in the evidence as well as in the written statement, it was still open to the parties to explain the same by way of filing an application for amendment of the written statement. That apart, mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when

no serious prejudice is shown to have been caused to the plaintiff/respondent No.1 so as to take away any accrued right.

Ragu Thilak D.John vs. S.Rayappan and Others [(2001) 2 SCC 472]. In para 6, Court observed: "If the aforesaid test is applied in the instant case, the amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimize the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in paras 8(a) to 8(f) of the plaint which were sought to be incorporated by way of amendment. We feel that in the circumstances of the case the plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for."

LAW OF LIMITATION AND AMENDMENT

L.J. Leach and Co. Ltd. & Anr. Vs. Messrs. Jardine Skinner and Co. - A.I.R. 1957 S.C. 357 has held :- "It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice." This view of Court has, since, been followed by a 3 Judge Bench of this Court

in the case of T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board & Ors. 2004 (3) SCC 392.

Pankaja and Anr. vs. Yellappa (D) by Lrs & Ors., as reported in AIR 2004 SC 4102 “While the learned counsel for the defendant-respondents pleaded that under Entry 58 of the Schedule to the Limitation Act, the declaration sought for by the appellants in this case ought to have been done within 3 years when the right to sue first accrued, the appellant-plaintiff contends that the same does not fall under the said Entry but falls under Entry 64 or 65 of the said Schedule of the Limitation Act which provides for a limitation of 12 years..... In such a situation where there is a dispute as to the bar of limitation this Court in the case of Ragu Thilak D. John Vs. S. Rayappan & Ors. 2001(2) SCC 472 (supra) has held :- "The amendment sought could not be declined. The dominant purpose of allowing the amendment is to minimise the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case. The plea of limitation being disputed could be made a subject-matter of the issue after allowing the amendment prayed for." that there is an arguable question whether the limitation applicable for seeking the relief of declaration on facts of this case falls under Entry 58 of the Limitation Act or under Entries 64 or 65 of the Limitation Act which question has to be decided in the trial”

Hon'ble Apex Court in the case of **Shiv Gopal Sah alias Shiv Gopal Sahu Vs. Sita Ram Sarangi and Others** reported in

MANU/SC/1672/2007 : AIR 2007 SCC 1478, wherein at paragraph Nos. 11 and 12 it is held as under:

"11. We have gone through the amendment application carefully where we do not find any explanation whatsoever for this towering delay. We would expect some explanation, at least regarding the delay since the delay was very substantial. The whole amendment application, when carefully scanned, does not show any explanation whatsoever. This negligent complacency on the part of the plaintiffs would not permit them to amend the plaint, more particularly when the claim has, apparently, become barred by time.

12. It is quite true that this Court in a number of decisions, has allowed by way of an amendment even the claims which were barred by time. However, for that there had to be a valid basis made out in the application and first of all there had to be bona fides on the part of the plaintiffs and a reasonable explanation for the delay. It is also true that the amendments can be introduced at any stage of the suit, however, when by that amendment an apparently time barred claim is being introduced for the first time, there would have to be some explanation and secondly, the plaintiff would have to show his bona fides, particularly because such claims by way of an amendment would have the effect of defeating the rights created in the defendant by lapse of time. When we see the present facts, it is clear that no such attempt is made by the plaintiffs anywhere more particularly in the amendment application".

Vishwambhar and Others Vs. Laxminarayan (dead) through LRs., and Another reported in MANU/SC/0374/2001 : (2001) 6 SCC 163, the Hon'ble Apex Court though held that the amendment though properly made cannot relate back to the date of filing of the suit and cure the defect of limitation where the amendment changed the basis of the suit itself, the suit would be taken to have been filed on the date of the amendment for the purpose of limitation.

K. Raheja Constructions Limited and Another Vs. Alliance Ministries and Others reported in MANU/SC/0339/1995 : 1995 Supp (3) SCC 17, the Hon'ble Apex Court at paragraph Nos. 3 and 4 held as under:

"3. Shri Santosh Hegde, learned Senior counsel for the petitioners, has contended that the petitioners have not come forward with any new plea. They have set out all the material allegations and their claims in the plaint. What they are seeking for is only a formal relief which, though not originally asked for, the omission does not preclude the petitioners to file the application under Order 6 Rule 17 seeking for the amendment of the plaint. The relief is really founded upon the facts set out in the plaint and it is the subsequent knowledge about permission granted by the Charity Commissioner for alienation, which required the amendment. We find that the contention is not tenable.

4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the

condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years to elapse from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent".

WHETHER AMENDMENT ONCE INCORPORATED RELATES BACK TO DATE OF SUIT – NO – COURT CAN FIX ITS DATE OF COMMENCEMENT:-

Sampath Kumar vs Ayyakannu And Anr. AIR 2002 SC 3369, 9. Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in

moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amendment. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed.

AMENDMENT OF WRITTEN STATEMENT

In Usha Balashaheb Swami and others vs. Kiran Appaso Swami and others: AIR 2007 SC 1663, It is equally well settled

principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case. As we have already noted herein earlier that in allowing the amendment of the written statement a liberal approach is a general view when admittedly in the event of allowing the amendment the other party can be compensated in money. Technicality of law should not be permitted to hamper the Courts in the administration of justice between the parties.

In the case of *L.J. Leach and Co. Ltd. v. Jardine Skinner and Co.* [AIR 1957 SC 357], this Court observed "that the Courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event". In that case this Court also held "that the defendant has right to take alternative plea in defence which, however, is subject to an

exception that by the proposed amendment the other side should not be subjected to serious injustice."

Akshaya Restaurant v. P. Anjanappa [1995 [Supp] (2) SCC 303] this Court held that even an admission in the pleadings can be explained and inconsistent pleas can be taken in amendment petition even after taking a definite stand in the written statement.

In Shrimoni Gurdwara Committee -vrs.- Jaswant Singh : (1996) 11 SCC 690, it has been held: "It is settled law that the defendant can raise mutually inconsistent pleadings in the written statement but it is for the court to consider whether the case can be properly considered in deciding the issue. But in this case the plea in the written statement is mutually destructive. In the first written statement, they have denied the title of himself. Therefore, they cannot set up a title in him and plead gift made by in favour of the petitioner-Committee. Under these circumstances, the High Court has rightly refused to grant the plaint. Moreover, there is no explanation given as to why they came forward with this plea at the belated stage after the parties had adduced the evidence and the matter was to be argued. Under these circumstances, there is no error of jurisdiction or material irregularity in the exercise of jurisdiction warranting inereference."

In Gautam Sarup -vrs.- Leela Jetly and others: (2008) 7 SCC 85, it has been pointed out that "an admission made in a

pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore". "What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

Hon'ble Supreme Court in Vimal Chand Ghevarchand Jain & Ors. -vrs.- Ramakant Eknath Jajoo: 2009(3) Supreme 460 the principle has been reiterated. It has been held: "..... Pleadings of the parties, it is trite, are required to be read as a whole. Defendants, although are entitled to raise alternative and inconsistent plea but should not be permitted to raise pleas which are mutually destructive of each other. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct. Equally well settled is the principle of law that an admission made by a party in his pleadings is admissible against him proprio vigore. [(See Ranganayakamma & Anr. V. K.S. Prakash (D) By Lrs. & Ors. [2008 (9) SCALE 144])"

In Baldev Singh and others vs. Manohar Singh and another: AIR 2006 SC 2832 also it was pointed out that the amendment

simply proposed an additional plea without having the effect of withdrawal of admission. At paragraph 13 of the decision it was pointed out: "In view of this decision, it can be said that the plea of limitation can be allowed to be raised as an additional defence by the appellants. Accordingly, we do not find any reason as to why amendment of the written statement introducing an additional plea of limitation could not be allowed. The next question is that if such amendment is allowed, certain admissions made would be allowed to be taken away which are not permissible in law. We have already examined the statements made in the written statement as well as the amendment sought for in the application for amendment of the written statement. After going through the written statement and the application for amendment of the written statement in depth, we do not find any such admission of the appellants which was sought to be withdrawn by way of amending the written statement."

In the decision reported in (2008) 5 SCC 117 (Chander Kanta Bansal vs. Rajinder Singh Anand), the Apex Court has laid down as under:- " As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restriction. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application. ... The words "due diligence" have

not been defined in the Code. According to Oxford Dictionary (Edn. 2006) the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care, caution,; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Eds.13-A) "due diligence" in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. As mentioned earlier, in the case on hand, the application itself came to be filed only after 18 years and till the death of her first son Sunit Gupta, Chartered Accountant, had not taken any step about the so-called agreement. Even after his death in the year 1998, the petition was filed only in 2004. The explanation offered by the defendant cannot be accepted since she did not mention anything when she was examined as witness."

(2010) 4 SCC 518 (State of Maharastra vs. Hindustan Construction Company Limited). Apex Court has laid down

that the Pleadings and particulars are required to enable the court to decide true rights of the parties in trial. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other decision, such discretion has to be exercised consistent with settled legal principles.

Apex Court reported in (1978) 2 SCC 91 (Ganesh Trading Co. v. Moji Ram) “Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.”

In L.J. Leach and Co. Ltd. & Anr. v. Messrs. Jardine Skinner and Co., AIR 1957 SC 357, the Supreme Court held (para.16): "It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice."

In Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary & Ors., 1995 Supp (3) SCC 179, the Supreme Court held (para.3) :

"As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his written statement under Order 6 Rule 17 CPC by taking a contrary stand than what was stated originally in the written statement. This is opposed to the settled law. It is open to a defendant to take even contrary stands or contradictory stands, thereby the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action. Be that so."

In K. Raheja Constructions Ltd. v. Alliance Ministries & Ors., AIR 1995 SC 1768 their Lordships of the Supreme Court held (para.4) : "It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years elapsed from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accrued to the respondent."

In Vishwambhar & Ors. v. Laxminarayan & Anr., (2001) 6 SCC 163, the Supreme Court held (para.10) : "From the averments of

the plaint, it cannot be said that all the necessary averments for setting aside the sale deeds executed by Laxmibai were contained in the plaint and adding specific prayer for setting aside the sale deeds was a mere formality. As noted earlier, the basis of the suit as it stood before the amendment of the plaint was that the sale transactions made by Laxmibai as guardian of the minors were ab initio void and, therefore, liable to be ignored. By introducing the prayer for setting aside the sale deeds the basis of the suit was changed to one seeking setting aside the alienations of the property by the guardian. In such circumstances, the suit for setting aside the transfers could be taken to have been filed on the date the amendment of the plaint was allowed and not earlier than that."

In Rajesh Kumar Aggarwal & Ors. v. K.K. Modi & Ors., AIR 2006 SC 1647, their Lordships of the Supreme Court held: "17. Order VI, Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

18. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed

for in the new suit cannot be permitted to be incorporated in the pending suit.

19.As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. if it is, the amendment will be allowed; if it is not, the amendment will be refused."

In Vidyabai & Ors. v. Padmalatha & Anr., 2009 (1) Supreme 238, their Lordships of the Supreme Court held (para.14): "It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."

AWARDING OF COSTS AND AMENDMENT

Revajeetu Builders & Developers Vs Narayanaswamy & Sons & Others CIVIL APPEAL NO.6921 OF 2009. DECIDED ON 09-10-2009 IT IS OBSERVED: In a recently published unique, unusual and extremely informative book "Justice, Courts and Delays", the author Arun Mohan, a Senior Advocate of the High Court of Delhi and of this Court, from his vast experience as a

Civil Lawyer observed that 80% applications under Rule VI Order 17 are filed with the sole objective of delaying the proceedings, whereas 15% application are filed because of lackadaisical approach in the first instance, and 5% applications are those where there is actual need of amendment. His experience further revealed that out of these 100 applications, 95 applications are allowed and only 5 (even may be less) are rejected. According to him, a need for amendment of pleading should arise in a few cases, and if proper rules with regard to pleadings are put into place, it would be only in rare cases. Therefore, for allowing amendment, it is not just costs, but the delays caused thereby, benefit of such delays, the additional costs which had to be incurred by the victim of the amendment. The Court must scientifically evaluate the reasons, purpose and effect of the amendment and all these factors must be taken into consideration while awarding the costs.

The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases.

WHETHER AMENDMENT IS NECESSARY TO DECIDE REAL CONTROVERSY: 61. The first condition which must be

satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

NO PREJUDICE OR INJUSTICE TO OTHER PARTY: 62.

The other important condition which should govern the discretion of the Court is the potentiality of prejudice or injustice which is likely to be caused to other side. Ordinarily, if other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side.

The costs cannot and should not be imposed arbitrarily. In our view, the following parameters must be taken into consideration while imposing the costs. These factors are illustrative in nature and not exhaustive. (i) At what stage the amendment was sought? (ii) While imposing the costs, it should be taken into consideration whether the amendment has been sought at a pre-trial or post-trial stage; (iii) The financial benefit derived by one party at the cost of other party should be properly calculated in terms of money and the costs be awarded accordingly. (iv) The imposition of costs should not be symbolic but realistic; (v) The delay and inconvenience caused to the opposite side must be clearly evaluated in terms of additional and extra court hearings compelling the opposite party to bear the extra costs. (vi) In case of appeal to higher courts, the victim of amendment is compelled to bear considerable additional costs.

All these aspects must be carefully taken into consideration while awarding the costs.

The purpose of imposing costs is to: a) Discourage malafide amendments designed to delay the legal proceedings; b) Compensate the other party for the delay and the inconvenience caused; c) Compensate the other party for avoidable expenses on the litigation which had to be incurred by opposite party for opposing the amendment; and d) To send a clear message that the parties have to be careful while drafting the original pleadings.

FACTORS TO BE TAKEN INTO CONSIDERATION WHILE DEALING WITH APPLICATIONS FOR AMENDMENTS: 67. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment. (1) Whether the amendment sought is imperative for proper and effective adjudication of the case? (2) Whether the application for amendment is bona fide or mala fide? (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money; (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation; (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

In similar circumstances, in a subsequent case Ganesh Trading Co. v. Moji Ram (1978) 2 SCC 91, this Court

reiterated the law laid down in Pursuhottam Umedbhai & Co. v. Manilal & Sons AIR 1961 SC 325. The Court observed: "It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation; to be put on every defective state of pleadings. Defective pleadings are generally curable, if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted

cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings."

In Jai Jai Ram Manohar Lal v. National Building Material Supply (1969) 1 SCC 869, A sued B in his individual name but afterward sought leave to amend the plaint to sue as the proprietor of a Hindu Joint Family business. The amendment was granted and the suit was decreed. The High Court, however, reversed the decree observing that the action was brought by a 'non-existing person'. Reversing the order of the High Court, Supreme Court (per Shah, J., as he then was) made the following oft-quoted observations: "Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party Applying, was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

In Haridas Aildas Thadani & Others v. Godraj Rustom Kermani (1984) 1 SCC 668 this Court said that "It is well settled that the court should be extremely liberal in granting prayer for amendment of pleading unless serious injustice or irreparable loss is caused to the other side. It is also clear that a revisional court ought not to lightly interfere with a discretion

exercised in allowing amendment in absence of cogent reasons or compelling circumstances.

In Suraj Prakash Bhasin v. Raj Rani Bhasin & Others, (1981) 3 SCC 652 this Court held that liberal principles which guide the exercise of discretion in allowing amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be readily granted while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted on the opposite party under pretence of amendment, that one distinct cause of action should not be substituted for another and that the subject-matter of the suit should not be changed by amendment.

RELIEF CLAIMED AND SUBSEQUENT CHANGES NECESSITATES AMENDMENT TO CLAIM OTHER RELIEF

Hon'ble the Apex Court in **Rajesh D. Darbar And Others Vs. Narasingrao Krishnaji Kulkarni And Others (2003(7) SCC 219)**, held that where the nature of relief, as originally sought, had become obsolete or unserviceable or a new form of relief would be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it was but fair that the relief was moulded, varied or reshaped in the light of updated facts. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice.

Hon'ble the Apex Court in **Kedar Nath Agrawal (Dead) And Another Vs. Dhanraji Devi (Dead) By LRs. And Another (2004**

(8) SCC 76), held that events happening after institution of a suit/proceeding, should be considered. It is the power and duty of the court to consider changed circumstances. A court of law may take into account subsequent events. the basis rule is that the rights of the parties should be determined on the basis of the date of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/ action. This, however, does not mean that events happening after institution of a suit/ proceeding, cannot be considered at all. It is the power and duty of the court to consider changed circumstances. A court of law may take into account subsequent events inter alia in the following circumstances:

- (i) the relief claimed originally has by reason of subsequent change of circumstances become inappropriate; or
- (ii) it is necessary to take notice of subsequent events in order to shorten litigation; or
- (iii) it is necessary to do so in order to do complete justice between the parties.

Court's judgment in **Pasupuleti Venkateswarlu v. Motor & General Traders [(1975) 1 SCC 770 : AIR 1975 SC 1409]** It was settled that the procedure was the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of molding it, is brought diligently to the notice of the Court, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Where a cause of action is deficient but later events have made up the deficiency,

the court may, in order to avoid multiplicity of the litigation, permit amendment and continue the proceeding, provided no prejudice is caused to the other side. All these are done only in exceptional situations and just cannot be done if the statute, on which the legal proceeding is based, inhibits, by its scheme or otherwise, such change in cause of action or relief. The primary concern of the court is to implement the justice of the legislation. Rights vested by virtue of a statute cannot be divested by this equitable doctrine. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief for the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is not violated, with a view to promote substantial justice-subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord

with the current realities, the Court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.

Court in Rameshwar v. Jot Ram (AIR 1976 SC 49). The courts can take notice of the subsequent events and can mould the relief accordingly. But there is a rider to these well-established principles. This can be done only in exceptional circumstances, some of which have been highlighted above. This equitable principle cannot, however, stand on the way of the court adjudicating the rights already vested by a statute. This well-settled position need not detain us, when the second point urged by the appellants is focused. There can be no quarrel with the proposition as noted by the High Court that a party cannot be made to suffer on account of an act of the court. There is a well-recognised maxim of equity, namely, *actus curiae neminem gravabit* which means an act of the court shall prejudice no man. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, *lex non cogit ad impossibilia* i.e. the law does not compel a man to do that what he cannot possibly perform. The applicability of the abovesaid maxims has been approved by this Court in *Raj Kumar Dey v. Tarapada Dey* [(1987) 4 SCC 398], *Gursharan Singh v. New Delhi Municipal Committee* [(1996) 2 SCC 459] and *Mohd. Gazi vs. State of M.P.* [(2000) 4 SCC 342].

AMENDMENT OF WRITTEN STATEMENT & FILING OF ADDITIONAL WRITTEN STATEMENT

P.A. Jayalakshmi VS H. Saradha & Ors. JUSTICE S.B. Sinha JUSTICE Deepak Verma, New Delhi; July 21, 2009, Code of Civil Procedure, 1908: Or. VIII, r. 9 and proviso to Or. VI, r. 17 - Additional pleadings - Suit for partition - Application filed by defendant-appellant seeking leave to file additional written statement - Rejected by Courts below - Justification of - Held: On facts, justified - The application was filed at a much belated stage - Statutory limitations brought about by reason of amendments in CPC to be kept in mind. Respondents filed suit for partition in the year 2004. Appellant filed written statement in 2006 and on 1-3-2007, filed application purportedly in terms of Or.VIII, r.9 CPC seeking leave to file additional written statement with regard to a Will in regard to the suit property, which was not mentioned in the written statement. By that time examination of one witness was over. The Will was purportedly executed in 1993 and it was urged by the appellant that she discovered the existence of Will only on 5-2-2007. The said application was dismissed by the Trial Court. Revision petition filed by appellant was dismissed by the High Court. It was contended that the Courts below failed to take into consideration that in effect and substance, appellant's application should have been treated to be one for amendment of written statement as envisaged under Order VI, r.17 CPC and not one for leave to file additional pleadings as envisaged under Or.VIII, r.9 thereof; that the appellant having raised a contention that she discovered the existence of Will only on 5-2-2007, even the requirements of the proviso appended to

Or.VI, r.17 CPC must be held to have been satisfied and that by reason of the said application, the appellant did not bring

about any change in the principal contention raised in her written statement as the said Will was sought to be brought on record wherefor requisite pleadings were necessary only to support her case that the property in question was not a joint family property. Dismissing the appeal, the Court held, With a view to put an end to the practice of filing applications for amendments of pleadings belatedly, a proviso was added to Order VI Rule 17 CPC. Order VI Rule 17 speaks of amendment of pleadings whereas Order VIII Rule 9 CPC provides for subsequent pleadings by a defendant. The distinction between the two provisions is evident. Whereas by reason of the former unless a contrary intention is expressed by the court, any amendment carried out in the pleadings shall relate back to the date of filing original thereof, subsequent pleadings stand on different footings.

In the present case, for reasons best known to the appellant, she had chosen to file her application seeking leave to file additional pleadings. Such a stand might have been taken by her with a view to obviate the bar created by reason of the proviso appended to Order VI, Rule 17 of CPC. The firm stand taken by the appellant both before the Trial Court as also the High Court was that her application was under Order VIII, Rule 9 of CPC . At no point of time, a contention was raised that she wanted to amend her pleadings.

Ordinarily at such a belated stage, leave for filing additional written statement is usually not granted. Noticeably one of the plaintiffs was examined on 1.3.2007. Despite the fact that the appellant is said to have discovered the existence of the Will on or about 5.2.2007, no question was put to the said witness with

regard to the said Will or otherwise. It is only at a later stage that the aforementioned application for grant of leave to file additional written statement was moved. There cannot be any doubt or dispute that the courts should be liberal in allowing applications for leave to amend pleadings but it is also well settled that the courts must bear in mind the statutory limitations brought about by reason of the Code of Civil Procedure (Amendment) Acts; the proviso appended to Order VI Rule 17 being one of them.

Sampath Kumar v Ayyakannu and Another, AIR 2002 SC 3369: (2002)7 SCC 559: 2002(4) KCCR 2839; wherein it has been held as follows:- "An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date of which the application seeking the amendment was filed".

Siddalingamma and Another v Mamtha Shenoy, AIR 2001 SC 2896: (2001)8 SCC 561: 2002 SCC (Cri.) 14 "On the doctrine of relation back, which generally governs amendment of pleadings unless for reasons the Court excludes the applicability of the doctrine in a given case the petition for eviction as amended would be deemed to have been filed originally as such and the evidence shall have to be appreciated in the light of the averments made in the amended petition. The High Court though set aside the order of the Trial Court but it is writ larger from the

framing of the order of the High Court, especially the portions which we have extracted from the order of the High Court and reproduced in earlier part of this judgment, that the learned Single Judge of the High Court also was not seriously doubting the genuineness of the landlady's requirement on the material available on record but was not feeling happy with the contents of the eviction petition as originally filed an over-zealous attempt on the part of the landlady in projecting her sister's sons and grand-children as her own".

Electronics And Controls Vs. The Karnataka Industrial Area Development Board, Bangalore and Another 2010 (6) KarLJ 294, Thus, where possession is claimed in a suit as a resultant consequence of declaration it would be governed by Article 65 and not Article 58 of the Limitation Act. The judgment of the Hon'ble Apex Court in the case of Abdul Waheed Khan v Bhawani and Others, AIR 1966 SC 1718 would be squarely applicable to the facts of the case.

PRINCIPLES GOVERNING AMENDMENT OF PLEADINGS IN A CIVIL SUIT 2012 SC

Justice P. Sathasivam, and Justice J. Chelameswar of Supreme Court of India in the case of **Rameshkumar Agarwal vs Rajmala Exports P.Ltd.& Ors.** Decided on 30 March, 2012. The court discussed the principles governing the Amendment of pleadings and held that "It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and

object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

Quoted case laws

In Rajkumar Gurawara (Dead) Through L.Rs vs. S.K. Sarwagi & Company Private Limited & Anr. (2008) 14 SCC 364, Court considered the scope of amendment of pleadings before or after the commencement of the trial. In paragraph 18, this Court held as under:- ".....It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation....."

In Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors. (2009) 10 SCC 84, Court once again considered the scope of amendment of pleadings. In paragraph 63, it concluded as follows: "Factors to be taken into consideration while dealing with applications for amendments

On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into

consideration while allowing or rejecting the application for amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) whether the application for amendment is bona fide or mala fide;
- (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

In Vidyabai and others v. Padmalatha and another, (2009) 2 SCC 409, the Apex Court held that it is the primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order VI, Rule 17 of the Code would restrict the power of the Court. It puts an embargo on exercise of its

jurisdiction. The Court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint.

In B.K.Narayana Pillai v. Parameswaran Pillai, (2000) 1 SCC 712, the Apex Court held as follows:

3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the Courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation.

In North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (died) by L.Rs., (2008) 8 SCC 511, the Apex Court held thus: In so far as the principles which govern the question of granting or disallowing Amendments under Order 6, Rule 17, C.P.C. (as it stood at the relevant time) are concerned, these are well settled. Order 6, Rule 17, C.P.C., postulates

amendment of pleadings at any stage of the proceedings. In *Piragonda Hongonda Patil v. Kalgonda Shidgonda Patil*, **1957 AIR 363, 1957 SCR 595** which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real question in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.

WHEN AMENDMENT IS SOUGHT TO BE ALLOWED CLAIMING MANDATORY RELIEF AS AMENDMENT

- i. MANU/SC/0812/2002 : 2002(4) KCCR 2839(SC) in the case of *Sampath Kumar v. Ayyakannu and Another*;
- ii. MANU/SC/0019/1981 : 1984(1) SCC 668 in the case of *Haridas Aildas Thadani and others v. Godrej Rustom Kermani*;
- iii. MANU/SC/8043/2006 : (2006) 4 SCC 385 in the case of *Rajesh Kumar Aggarwal and others v. K.K. Modi and others*;
- iv. MANU/SC/8018/2007 : AIR 2008 SC 363 in the case of *C. Natarajan v. Ashim Bai and Anr.*
- v. MANU/KA/0048/1991 : AIR 1991 KARNATAKA 273 in the case of *Seshumull M. Shah v. Sayed Abdul Rashid and others*
- vi. MANU/KA/0822/2010 : AIR 2010 KAR 519 in the case of *Electronics and Controls, Bangalore by L.Rs v. Karnataka Industrial Area Development Board, Bangalore.*

- vii. MANU/SC/0590/2004 : (2004) 6 SCC 415 in the case of Panjkaja and another v. Yellappa (D) by L.Rs and others
- viii. MANU/KA/0090/2016 in the case of Agnel B. Pereira v. KAV Bhanu Prakash
- ix. MANU/WB/0863/2016 in the case of Mritunjoy Ganguly v. H.N. Memorial Institution
- x. MANU/SC/0804/2012 : (2012) 11 SCC 341 in the case of Abdul Rehman and another v. Mohd. Ruldu and others
- xi. MANU/SC/0085/2015 : (2015) 4 SCC 182 in the case of Mount Mary Enterprises v. Jivratna Medi Treat Private Limited"

WHEN AMENDMENT IS OPPOSED

- "1. MANU/SC/7376/2008 : (2008) 4 SCC 594 (Anathula Sudhakar v. P Buchi Reddy (Dead) by LR's and Others)
- 2. MANU/SC/0922/2015 : AIR 2015 SC 3364 (L.C. Hanumanthappa (Since dead) represented by his LR's v. H.B. Shivakumar)
- 3. MANU/SC/1054/2011 : AIR 2011 SC 3590 (Khatri Hotels Private Limited and Another v. Union of India and Another)
- 4. MANU/SC/7510/2008 : (2008) 15 SCC 610 (Ashutosh Chaturvedi v. Prano Devi Alias Parani Devi and Others)
- 5. MANU/SC/0450/2005 : (2005) 6 SCC 344 (Salem Advocate Bar Association, T.N. v. Union of India)
- 6. MANU/SC/8401/2008 : (2009) 2 SCC 409 (Vidyabai and Others v. Padmalatha and Another)

7. MANU/SC/7703/2008 : 2008 (14) SCC 364 (Rajkumar Gurawara (dead) through LRs. v. S.K. Sarwagi and Company Private Limited and Another
8. MANU/SC/0955/2011: (2011) 12 SCC 268 (State of Madhya Pradesh v. Union of India and Another).
9. MANU/SC/1724/2009 : (2009) 10 SCC 84 (Ravajeetu Builders and Developers v. Narayanaswamy and Sons and Others.
10. MANU/SC/1886/2009 : (2010) 2 SCC 114 (Dalip Singh v. State of Uttar Pradesh and Others)"

1. MANU/KA/0183/1988 : ILR 1989 KAR 993 (Dada Jinnappa Khot v. Shivalingappa Ganapati Bellanki)
2. MANU/SC/1054/2011 : (2011) 9 SCC 126 (Khatri Hotels Private Limited and Another v. Union of India (UOI) and Another
3. MANU/KA/1756/2014 : ILR 2014 KAR 5111 (Basavaraj Basavanneppa Pattan v. The Government of Karnataka)
4. 2014 (2) KAR.L.J 372 (Union of India and Others v. Azamathulla Mekhri and Another)
5. MANU/SC/0922/2015 : AIR 2015 SC 3364 (L C Hanumanthappa v. H B Shivakumar)
6. MANU/SC/0600/2004 : AIR 2004 SC 4261 (Ramiah v. N Narayana Reddy (Dead) by LRs.)
7. MANU/KA/2959/2013 (The Golden Valley Educational Trust Oorgam Represented by Its President v. The Vokkaligara Sangha Represented by its Secretary)
8. MANU/SC/0178/1997 : AIR 1997 SC 772 (T L Muddukrishanan and another v. Smt. Lalitha Ramchandra Rao)

9. MANU/KA/1021/2001 : 2001 (2) KCCR 1229 (Chowdappa and Another v. Munivenkatappa by LR)
10. MANU/SC/1672/2007 : AIR 2007 SC 1478 (Shiv Gopal Sah @ Shiv Gopal Sahu v. Sita Ram Saraugi and Others)
11. MANU/SC/7310/2008 : AIR 2008 SC 2234 (Chander Kanta Bansal v. Rajinder Singh Anand)
12. MANU/AP/0753/2011 : 2012 (1) ALD 259 (Sri Ramoji Rao and Another v. M.A.E. Kumar Krishan Varma and Another)
13. MANU/SC/0028/2012 : 2012 (2) SCC 300 (J Samuel and Others v. Gattu Mahesh and Others)
14. MANU/SC/8401/2008 : AIR 2009 SC 1433 (Vidyabai and Others v. Padmalatha and Another)
15. MANU/SC/1886/2009 : (2010) 2 SCC 114 (Dalip Singh v. State of Uttar Pradesh and Others)"

AMENDMENT - IF AN APPLICATION IS FILED AFTER COMMENCEMENT OF TRIAL, IT HAS TO BE SHOWN THAT IN SPITE OF DUE DILIGENCE, SUCH AMENDMENT COULD NOT HAVE BEEN SOUGHT EARLIER

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The proviso to Order VI Rule 17, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if an application is filed after commencement of trial, it has to be

shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

PARTY CANNOT SET UP ENTIRELY NEW CASE BY WAY OF AMENDMENT

(1998) 1 SCC 278, Heeralal v. Kalyan Mal and Ors. (1976) 4 SCC 320, Modi Spinning and Weaving Mills Company Limited and Anr. v. Ladha Ram and Company “the amendment to the written statement cannot be allowed when the effect would be to displace a party and to deprive him or her from a valuable right already accrued to him. The party seeking amendment cannot be allowed to set up an entirely new case.”

APPLICATIONS TO DRAG PROCEEDINGS

Karnataka High Court - Smt U Suvarnamma vs Sri S Thippeswamy on 9 January, 2017 At the outset, it is noted that the suit is at the fag end of the proceedings. In fact, the recording of evidence has been concluded on the basis of recast issues and the additional issue. Arguments have been advanced both on behalf of the plaintiffs as well as defendants in the suit. The suit is at the stage of reply arguments. At that stage, the application has been filed. The said application is highly belated and unwarranted. When the parties to the suit have already let-in evidence on the basis of the recast issues and the additional

issue at the stage of reply arguments, it was wholly unnecessary to file an application under Order XIV Rule 5 read with Section 151 of the CPC. In fact, from the impugned order it is noted that the plaintiffs filed an application under Order VI Rule 17 of the CPC seeking amendment of the plaint, which was also at the stage of reply arguments. Being unsuccessful in that application, another application is filed for deletion of recast issue No.1 and additional issue. Such attempts made by the plaintiffs is nothing but to drag on the proceedings or protract the proceedings as noted by the trial court in the impugned order. I do not find any infirmity in the impugned order.

AFTER AMENDMENT FRESH VERIFYING AFFIDAVIT TO BE FILED

Supreme Court reported in **Salem Advocate Bar Association vs. Union Of India, MANU/SC/ 0450/2005 : 2005 (6) SCC 344** and the provisions of Order VI Rule 15(4) read with Section 26(2), C.P.C. Para-4 of the said judgment is quoted below: "4. Prior to insertion of aforesaid provisions, there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided in Section 26(2) and the person verifying the pleadings to furnish an affidavit in support of the pleading [Order VI Rule 15(4)]. It was sought to be contended that the requirement of filing an affidavit is illegal and unnecessary in view of the existing requirement of verification of the pleadings. We are unable to agree. The affidavit required to be filed under amended Section 26(2) and Order VI

Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof."

Adv - Sridhara babu N

CHAPTER
INTERIM ORDERS AND INJUNCTION

INJUNCTION CANNOT BE GRANTED IN DOUBTFUL CASES

Court in the case of LAKSHMINARASIMHIAH AND OTHERS vs. YALAKKI GOWD reported in MANU/KA/0116/1965: AIR 1965 Mysore 310 wherein it is held that injunction cannot be granted in doubtful cases.

Dalpat Kumar v. Prahlad Singh, MANU/SC/ 0715/1991 : (1992) 1 SCC 719, observing as follows: 5...Satisfaction that there is a prima facie case by itself is not sufficient to grant

injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

Gujarat Bottling Co. Ltd. v. Coca Cola Co., MANU/SC/0472/1995 : (1995) 5 SCC 545, observing as follows: 47....Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other

considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest....

Ambalal Sarabhai Enterprise Limited and Ors. vs. KS Infraspace LLP Limited and Ors. : MANU/SC/0003/2020 -

Chapter VII, Section 36 of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') provides for grant of preventive relief. Section 37 provides that temporary injunction in a suit shall be regulated by the Code of Civil Procedure. The grant of relief in a suit for specific performance is itself a discretionary remedy. A Plaintiff seeking temporary injunction in a suit for specific performance will therefore have to establish a strong prima-facie case on basis of undisputed facts. The conduct of the Plaintiff will also be a very relevant consideration for purposes of injunction. The discretion at this stage has to be exercised judiciously and not arbitrarily.

Apex Court is reported in MANU/SC/0912/2004 : (2004) 8 SCC 488 in the case of Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass as also reported in AIR 2005 SC 104, wherein it has been held that as a normal rule, status quo

during the pendency of the proceedings has to be preserved unless extra-ordinary circumstance is emerging and simply because the litigation will take some more time, same would not be treated as an exceptional circumstance to alter the status quo. Keeping the aforesaid proposition laid down by Hon'ble Apex Court, this Court is examining the submissions in co-relation with the record as to whether any deviation is possible from the aforesaid proposition and for that purpose, few circumstances which are emerging from the record are not possible to be ignored by the Court.

In the case of **Wander Limited versus Antox India Private Limited reported in MANU/SC/ 0595/1990 : 1990 (Supp) SCC 727**, the relevant observations contained in paragraph 9 are reproduced hereinafter: "(9) Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated: "--Is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented 732 from

exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience lies."the interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted."

Mandali Ranganna and others vs. T. Ramachandra and others reported in MANU/SC/7567/2008 : AIR 2008 SC 2291 held as under:

18. While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto, viz., existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.

Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one. We are not however, oblivious of the fact that grant or refusal of injunction has serious

consequence depending upon the nature thereof. The courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the courts is imperative. Contentions raised by the parties must be determined objectively.

23. Rightly or wrongly constructions have come up. They cannot be directed to be demolished, at least at this stage. Respondent No. 7 is said to have spent three crores of rupees. If that be so, in our opinion, it would not be proper to stop further constructions.

24. We, therefore, are of the opinion that the interest of justice would be sub-served if while allowing the respondents to carry out constructions of the buildings, the same is made subject to the ultimate decision of the suit. The Trial Court is requested to hear out and dispose of the suit as early as possible. If any third party interest is created upon completion of the constructions, the deeds in question shall clearly stipulate that the matter is sub-judice and all sales shall be subject to the ultimate decision of the suit. All parties must cooperate in the early hearing and disposal of the suit. Respondents must also furnish sufficient security before the learned Trial Judge within four weeks from the date which, for the time being, is assessed at Rupees One Crore.

25. For the reasons aforementioned, the appeals are dismissed subject to the observations and directions made hereinbefore. However, in the facts and circumstances of the case, there shall be no order as to costs.

V. Anil Reddy vs. K. Venkataramana Reddy and Ors.:

MANU/KA/1122/2017 - It is well settled principle of law that while considering an application for grant of Injunction, the Court will not only take into consideration the basic elements in relation thereto viz., (a) existence of prima facie case; (b) balance of convenience; and (c) irreparable injury, but it must also take into consideration the conduct of the parties. Grant of Temporary Injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal the properties exclusively, ordinarily would not be entitled to an order of Temporary Injunction. The Court will not interfere only because the property is a very valuable one. The fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The Courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the Courts is imperative. Contentions raised by the parties must be determined objectively.

EVEN APPELLATE COURT CAN GRANT INJUNCTION

K. VENKATASWAMI .vs. M. JAGANNADHA RAO reported in **AIR 1999 SC 2171**, with regard to grant of injunction and contended that even the Appellate Court can grant injunction holding that the same will not come in the way of the suit being decided on its own merits.

'STATUS QUO' IMPLIES THE EXISTING STATE OF THINGS AT ANY GIVEN POINT OF TIME

Supreme Court in **M/S.BHARAT COOKING COAL LTD. v. STATE OF BIHAR (A.I.R.1988 S.C.127)**, the expression 'status quo' is undoubtedly a term of ambiguity and at times gives rise to doubt and difficulty. According to the ordinary legal connotation, the term 'status quo' implies the existing state of things at any given point of time. The scope and effect of the status quo order as meaning the state of things existing while the matter was still pending. It is obvious that status quo as in the High Court cannot mean anything else except status quo as existing when the matter was pending in the High Court before the judgment was delivered. In substance, the status quo as prevailing between the parties when the matter was pending in the High Court had to be maintained.

POLICE CAN BE DIRECTED TO IMPLIMENT CIVIL COURT ORDERS

In **PAPANNA v. NAGACHARI ILR 1996 KAR 127** "When the Court has prima facie considered the matter and has granted a

temporary injunction in favour of the plaintiff after hearing the defendant, the Court has to enforce the same and the contention of the defendant that he is in possession, cannot be accepted at this stage. If the Court had no power to implement its own orders, then there is no purpose in the Courts passing orders in matters coming before them. The remedy under Order 39 Rule 2(a) is not exhaustive and Court can pass appropriate orders to see that its orders are enforced. In necessary cases, even the police can be directed to enforce the orders of the Court."

.....INHERENT POWERS:- A bare perusal of Section 151 of the Code of Civil Procedure, it cannot be said to be in dispute that Section 151 confers wide powers on the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The power of Section 151 to pass order of injunction in the form of restoration of possession of the code is not res integra now. In *Manohar vs. Hira Lal* [AIR 1962 SC 527] while dealing with the power of the Court to pass orders for the ends of justice or to prevent the abuse of the process of the Court, this Court held that the courts have inherent jurisdiction to issue temporary order of injunction in the circumstances which are not covered under the provisions of Order 39 of the Code of Civil Procedure. However, it was held by this Court in the aforesaid decision that the inherent power under Section 151 of the Code of Civil Procedure must be exercised only in exceptional circumstances for which the Code lays down no procedure.

CIVIL PROCEDURE - APPOINTMENT OF COMMISSIONER TO RECORD EVIDENCE AND AFFIDAVIT

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The affidavit required to be filed under the amended Section 26(2) and Order VI Rule 15(4) of the Code of Civil Procedure, 1908 has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.

The Court has already been vested with the **power to permit affidavits to be filed as evidence** as provided in **Order XIX Rules 1 and 2 of the Code**. It has to be kept in view that the right of cross-examination and re-examination in open Court has not been disturbed by **Order XVIII Rule 4** inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 had been examined and its validity upheld in Salem Advocates Bar Association, T.N. v. Union of India, [2003] 1 SCC 49,. There is also no question of inadmissible documents being

read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further the trial Court in appropriate cases can permit the examination-in-chief to be recorded in the Court. The proviso to Order XVIII Rule 4(2) clearly suggests that the Court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in Court or by the Commissioner appointed by it.

The **power under Order XVIII Rule 4(2)** is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the Court to appoint a Commissioner to record cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, and serious disputes as to the execution of the Will etc. In such cases, as far as possible, the Court may prefer to itself record the cross-examination of the material witnesses. Although when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witnesses yet the will of the legislature, which has, by amending the Code, provided for recording evidence by the Commissioner for saving Court's time

taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. In any case Order XVIII Rule 4, specifically provided that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner.

In some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. However, it is for the High Courts to examine this aspect and decide to adopt or not such a procedure.

Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, generally the expenses incurred towards the fee payable to the Commissioner is likely to be less than the expenditure incurred for attending the Courts on various dates for recording of evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and, therefore, in reality in most of the cases, there could be no additional burden.

Order XVIII Rule 19 which was inserted by the Amendment Act of 1999 overrides **Order XVIII Rule 5** which provides the Court to record evidence in all appealable cases. The Court is, therefore,

empowered to appoint a Commissioner for recording of evidence in appealable cases as well.

The discretion to declare a witness hostile has not been conferred on the Commissioner. The powers delegated to the Commissioner under Order XXVI Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act, 1872, to declare a witness hostile.

If a situation as to declaring a witness hostile arises before a Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the Commission so as to itself record the remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party.

Undoubtedly, the Commissioner has to take proper care of the original documents handed over to him either by Court or filed before him during recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with

the Court in cases long adjournments are granted and for taking back the documents before the adjourned date.

Even before insertion of Order XVIII Rule 17-A, **the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence.** Order XVIII Rule 17-A did not create any new rights but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.

SUIT FOR PERMANENT INJUNCTION IN THE ABSENCE OF PRAYER FOR CANCELLATION OF SALE NOT MAINTAINABLE

In *Ajay Mohan V. H.N.Rai* (2008(2) SCC 507), AIR 2008 SC 804, the Supreme Court had held that in a suit for permanent injunction it is necessary for the party concerned to plead entitlement and the basis for seeking such a relief. It had also been held that the suit was not maintainable in the absence of the prayer for cancellation and for setting aside the sale.

MANDATORY INJUNCTION

Apex Court in the case of MOHD. MEHTAB KHAN .vs. KHUSHUNMA IBRAHIM (AIR 2013 SC 1099), grant of mandatory interim relief requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction; It is, indeed, a rare power.

INJUNCTION WITHOUT POSSESSION CANNOT BE GRANTED

Anathula Sudhakar v. P. Buchi Reddy (Dead) by Lrs & others MANU/SC/7376/2008 : AIR 2008 SC 2033], wherein the Apex Court has laid down the general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief. It was held in paragraphs 11.1 to 11.3 as follows:

"11.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

"But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs."

"(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in *Annaimuthu Thevar* (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for

declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

The decision in Anathula Sudhakar (supra) has been followed by the Apex Court in **Muddasani Venkata Narsaiah(d) through Lrs. v. Muddasani Sarojana [MANU/SC/0524/2016 : 2016 SAR (Civil) 829]** and held that in a suit wherein the plaintiff had purchased the suit property through a registered sale deed and the defendant did not claim title with reference to any document but claimed to have perfected title by adverse possession, the said plea did not prima facie put any cloud over the plaintiff's title calling him to file a suit for declaration of title.

Ramji Rai and another v. Jagdish Mallah (Dead) through L.Rs. and another [MANU/SC/8755/2006 : AIR 2007 SC 900], wherein it was held in paragraph 10- "Under Section 38 of the Specific Relief Act, 1963 an injunction restraining disturbance of possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights."

CHAPTER

ISSUES, INHERENT POWERS AND COURT FEE

OBJECT OF FRAMING OF ISSUES

Gowramma vs. Rangappa: MANU/KA/0018/2015

The defendant had, in the written statement, raised the specific contention that the suit of the plaintiff was barred by the law of limitation and the valuation slip filed and court fee paid was also not correct. In spite of such contention raised in the written statement, regarding the legal aspect, the trial court had not framed any issues on those aspects. Even when the appeal was preferred before the first appellate court, it had also not considered these aspects and simply proceeded to endorse the views of the trial court, though there is power to the first appellate court as per Order LXI Rule 25 of CPC to frame appropriate issues arising out of the pleadings when such issues

are not framed by the trial court. The said issues, on payment of court fee as well as the limitation aspects, also require recording of evidence of the parties. As per Order XIV of CPC, the object of framing issues, regarding the material facts ascertained by one party and its denial by the other party, is to bring to the notice of parties what they have to prove and what is the burden cast on them. The object of framing of such issues is to draw the attention of the parties about the burden of proof. In the absence of framing of such issues, in spite of taking the specific plea in the pleadings, the parties may not be serious about those aspects while leading their evidence, as such issues were not framed by the court. In view of these infirmities in the judgment and decrees of the courts below, the matter requires to be remanded back to the trial court for fresh disposal.

ISSUES IN INJUNCTION SUIT

Elsy D'souza vs. Precilla R. D'souza: MANU/KA/0483/2018

The Trial Court, considering the first application filed under Order XIV Rules 1, 2 and 5 read with Section 151 Civil Procedure Code, by Order dated 06.11.2015 rejected the application mainly on the ground that in an injunction suit, consideration is limited to whether the plaintiff is in possession of the property and if there is any interference, relief could be granted and framing of issues does not arise. The Trial Court recorded a finding that the additional issues sought to be framed are not at all relevant to decide the real controversy between the parties. The defendant has challenged the settlement deed and also claimed that she is

one of the co-owners of the suit property. But the defendant has no locus-standi to challenge the settlement deed as she has not executed the same in favour of the plaintiff and the defendant has not sought any counter claim, either. The issues already framed are sufficient to resolve the dispute between the parties. The Trial Court held that the additional issues sought to framed are not necessary and accordingly rejected the application. High Court held that “Ultimately, the defendant having denied the title of the plaintiff, it is for the plaintiff to prove that she is the owner and in possession of the suit property and defendant has encroached the said property. Therefore the issues framed by the Court originally, would suffice to resolve the issue between the parties.” “Even an issue decided on I.A. cannot be re-agitated by filing an application at a later stage in the same proceedings which amounts to res-judicata.”

WHEN THERE IS SPECIFIC DEFENCE PROPER ISSUES TO BE FRAMED

Azeez Mohammed and Ors. vs. Arthur R.W. Towt and Ors.: MANU/KA/0136/2018 It is also relevant to state that though a specific defence was taken by the defendants in the written statement with regard to cause of action and suit is barred by law of limitation, unfortunately, the Trial Court has not framed proper issue with reference to the pleadings in the plaint and the written statement and amended the written statement as contemplated under Order XIV Rule 1 and 2 of Code of Civil

Procedure. Therefore, it is the duty of the Trial Court to frame proper issues with regard to specific defence taken in the pleadings. The same has not been done in the present case. Therefore, it is suffice to direct the Trial Court to frame proper issue with regard to cause of action and law of limitation as specifically contended in the amended written statement filed by the defendants 2 to 5 and proceed with the suit in accordance with law.

WHETHER AN ISSUE WAS EARLIER DECIDED ONLY INCIDENTALLY OR COLLATERALLY, THE COURTS COULD DEAL WITH THE QUESTION AS A MATTER OF LEGAL PRINCIPLE RATHER THAN ON VAGUE GROUNDS.

T.Ravi & another vs B.Chinna Narasimha and others reported in 2017 (3) Scale 740.

In *Sulochana Amma v. Narayanan Nair* (1994) 2 SCC 14 this Court held that a finding as to title given in an earlier injunction suit would be res judicata in a subsequent suit on title. On the other hand, the Madras High Court, in *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple v. Rajanga Asari* AIR 1965 Madras 355 held (see para 8 therein) that the previous suit was only for injunction relating to the crops. Maybe, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right. These two decisions, in our opinion, cannot be

treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, it is to be assumed that the tests above-referred to were satisfied for holding that the finding as to possession was substantially rested on title upon which a finding was felt necessary and in the latter case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in Mulla, it all depends on the facts of each case and whether the finding as to title was treated as necessary for grant of an injunction in the earlier suit and was also the substantive basis for grant of injunction. In this context, we may refer to Corpus Juris Secundum (Vol. 50, para 735, p.229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:

“Where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title.”

In Commissioner of Endowments & Ors. v. Vittal Rao & Ors. (2005) 4 SCC 120, it has been held thus :

“28. In support of his submission, the learned counsel for Respondent 1 contended that as long as an issue arises substantially in a litigation irrespective of the fact whether or not a formal issue has been framed or a formal relief has been claimed, a finding on the said issue would operate as res judicata, strongly relied on the decision of this Court in Sajjadanashin Sayed Md. B.E. Edr. v. Musa Dadabhai Ummer (supra). Paras 18 and 19 of the said judgment read : (SCC pp.359-60) "18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter 'directly and substantially' in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was 'directly and substantially' in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was 'necessary' to be decided for adjudicating on the principal issue and was decided, it would have to be treated as 'directly and substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Isher Singh v. Sarwan Singh AIR 1965 SC 948 and Syed Mohd. Salie Labbai v. Mohd.

Hanifa (1976) 4 SCC 780). We are of the view that the above summary in Mulla is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p. 105): 'It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision.' "

Anathula Sudhakar v. P. Buchi Reddy (dead) by LRs. & Ors. (2008) 4 SCC 594 wherein the Court had summarized the conclusions thus: :

"21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the

plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar v. Alagammal* (2005) 6 SCC 202. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence,

if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

SOME MATERIAL TO BE THERE TO TREAT ISSUE AS PRELIMINARY ISSUE

Bangalore Mico Shramajeevi Karmikara Gruha Nirmana Sahakara Sangha Niyamitha vs. I.N. Krishna Madhyastha and Ors.: MANU/KA/1541/2017 When the matter was posted for cross-examination of P.W.1, the defendant No. 1 filed application under Order XIV Rule 2(2) read with Section 151 of CPC requesting the Court to adjudicate Issue No. 4 regarding Court fee as preliminary issue contending that the value of the suit schedule property is more than Rs. 25,00,000/-. The Court fee paid by the plaintiff is insufficient. Therefore, the same has to be adjudicated before proceeding with the suit. The said application was resisted by the plaintiff by filing objections contending that

the application is filed only to drag the proceedings. The Court fee paid was sufficient. Therefore, sought for dismissal of the application. The Trial Court, considering the application and objections, by the impugned order dated 19th January 2017, dismissed the application with costs of Rs. 300/-. Hence, the present writ petition is filed. High court held that “The material on record clearly indicates that except assertion made by the defendants, no material documents issued by the competent authority are produced to show the market value of the suit schedule property is more than Rs. 25,00,000/-. In the absence of any material document to prove the market value of the property, the impugned order is in accordance with law.”

RECASTING OF ISSUE – PATERNITY TEST

P.S. Shivakumar vs. P.H. Subbarayappa and Ors.: MANU/KA/0953/2017 - Under Order 14 Rule 5 CPC the Court has power to amend the issues framed including framing of additional issue at any time before passing of a decree on such terms as it thinks fit, which in its opinion may be necessary for determining the matters in controversy between the parties. A bare reading of Order 14 Rule 1(1) CPC would indicate that when a material proposition of fact or law is affirmed by one party and denied by the other, then, an issue would arise for being framed. Whoever desires any Court to give a judgment as to any legal right dependent on the existence of facts which he asserts, must prove that those facts exist. *ei incumbit probatio qui dicit, non qui negat* - The proof lies upon him who affirms, not upon him

would denies. In other words, burden will lie on the party who asserts the fact to be taken note of by the Court in his favour and as such, burden shifts on the person so asserting. *cum per rerum naturam factum negantis probatio nulla sit* - Since by the nature of things he who denies a fact cannot produce any proof. In other words, a negative is usually incapable of proof.

14. Thus, onus is always on a person who asserts a proposition or fact, which is not self evident. For instance, to assert that a man who is alive was born requires no proof. The onus, is not on the person making the assertion, because it is self evident that he had been born. However, if he asserts that he had been born on a certain date or to a certain person, it requires proof, the onus would be on the person making such assertion.

15. The burden of proof cannot be held would always be static. It keeps oscillating and in the event of the initial burden cast on a person is discharged by tendering evidence in that regard, then automatically, the burden shifts on the other person to disprove the said fact and likewise, it shifts back to the person who originally asserted the said fact on other person discharging his burden by rebuttal evidence. In this background, when the facts on hand are examined, it would clearly disclose that plaintiff has categorically asserted in the plaint that first defendant is his father and he was born through his first wife Smt. Radhamma.

On the basis of above pleading, plaintiff has contended that he and first defendant constituted a Hindu undivided joint family and as such, he is entitled for a share in the suit properties. It is because of this specific plea raised, burden had been cast on the

plaintiff under issue No. 1 which has since been re-casted. Only in the event of plaintiff discharging the said burden, defendants would be required to disprove the said fact. Mere production of documents like School records would not give scope for presumption being raised with regard to existence of facts. An admission insofar as facts are concerned would bind the maker of admission but not insofar as it relates to a question of law vide Section 17 of the Evidence Act.....

The presumption available under Section 112 of Evidence Act would come into play where the husband questions the paternity of son or daughter, as the case may be, by contending that he had no access to the wife. A presumption of a fact depends upon satisfaction of certain circumstances. Those circumstances would ultimately lead to the fact sought to be presumed. This is what Section 112 provides for by way of presumption. Said Section would be inapplicable to the facts on hand, inasmuch as, it is not the case of first defendant that he had no access to his wife or there was no cohabitation between them. But on the other hand, it is not only the case of first defendant - father of plaintiff but also it is the case of mother - D.W. 5 also that she could not conceive and beget any children and as such she has forced first defendant to marry second defendant. In fact, she has categorically denied that plaintiff is her son. As such, presumption available under Section 112 of the Evidence Act would not come into play in the instant case or in other words, it would not be applicable to the facts obtained in the instant case.

THE FAILURE TO FRAME AN ISSUE IS NOT ALWAYS FATAL

K. Ballarigowda vs. Sarojamma: MANU/KA/ 2058/2017 Order XIV Rule 1 of CPC says that, when a material preposition of fact or law is affirmed by one party and denied by other, there arises an issue of fact and an issue of law. The court has to frame issues on the basis of contentions and denials made by the parties. If there is any omission to frame such issues or there is any irregularity in framing of issues, whether that itself is sufficient to non-suit the plaintiff, is the question. The failure to frame an issue is not always fatal to a suit, provided the court has understood the case of the plaintiff and the defendant, and framed certain issues which in fact covers all the pleadings and contentious facts stated by the plaintiff and the defendant. On going through such materials, if substantial justice has been administered by the Court, then omission to frame a specific issue, will not become fatal. The party has to specifically show to the court that non-framing of such an issue, certainly caused prejudice to him, that means no opportunity was given to the party to lead evidence and the party has not understood the case of the plaintiff or the defendant to lead appropriate and adequate evidence. Therefore, a mere non-framing of an issue cannot be said to cause prejudice to the party when both the parties have understood as to what are their cases and how they have to lead evidence; what burden is cast upon them and what they have to seek before the Court.

33. It is also to be borne in mind that where the issues do not sufficiently direct the attention of the parties to the main

question of fact necessarily to be decided and the party is misled, or confused or prevented from adducing the evidence, then only it would cause prejudice to the party and the trial will stand vitiated. However, one must clearly bear in mind that omission to frame a particular issue or framing of any issue incorrectly or the issue if found defective or imperfect or improper, or wrong, it will not always be a fatal or vitiating factor. A vital point to be considered by the Court is that, whether the parties are not prejudiced and the parties having understood their cases, went to the trial knowing that same facts are in issue and adduced the evidence, or disposal of the case on merits, is not affected and substantial justice has been done. If it is established that, the parties are alive to the controversy between them and substantially led the evidence on it, and they have discussed it during the trial, it cannot be said that, mere non-framing of specific issue would uproot the entire case.

34. It is the basic fundamental principle of civil jurisprudence that even some procedural irregularities occurred during the course of granting substantive reliefs to the parties, the court has got ample power to mould the relief in order to avoid multiplicity of proceedings between the parties. It is also to be borne in mind that all the controversy between the parties, which are pleaded and the parties are allowed to prove those pleadings, should be set at rest, by ignoring minor irregularities in following the procedure. The substantive rights arising out of substantive laws prayed by the parties and the rights which are all available to the parties at the time of filing of the suit, shall be adjudicated at once, at the time of the conclusion of the suit.

These principles should be borne in mind in order to avoid dragging the parties to some other Forum to seek for their remedies. This also saves valuable time of the court and also valuable time and money of the parties.

35. Now returning to the facts of this case, what I have already observed is, though some irregularity has occurred in framing issues, in fact, the parties have really understood what are their cases and they have adduced evidence with reference to the declaration, mandatory injunction, illegal construction over property and all the factual aspects have been in detail made by both the parties in their evidence. After considering such over all evidence, the trial Court and the First Appellate Court have definitely come to the conclusion that Site No. 13 belonged to the plaintiff and 1st defendant is in no way connected to the said property and thereby granted the relief in favour of the plaintiff. Therefore, I do not find any reason to hold that the trial court has committed any serious legal error, which caused prejudice in not specifically framing any issue with regard to recovery of possession and it caused any prejudice to the defendant.

WHEN MERE OMISSION TO FRAME THE ISSUE DOES NOT VITIATE THE PROCEEDINGS

Bheemrao vs. Srimanth and Ors.: MANU/KA/2199/2016

When a finding is recorded on appreciation of evidence lead by parties, mere omission to frame the issue does not vitiate the proceedings. Both the Courts below while deciding the matters

have considered the contention raised by the parties in their pleadings, so also the evidence lead extensively. I do not find any illegality in the judgment and decree of the Courts below nor there is any perverse or capricious view taken in coming to such conclusion.

Karnataka High Court reported in MANU/KA/0587/2009 : ILR 2009 KAR 3897 in the case of M.C. Suresh v. Sri. B. Srinivas Naik and others - Mere Omission to frame an issue is not fatal to the trial of the suit unless it has affected disposal on the merits-Though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the Court and the Court decides the point as if there was an issue framed on it, the decision will not be set aside in appeal on the ground that no issue was framed..... In the instant case parties have let in their evidence on the plea of discharge.--Merely because an issue has not been framed casting the burden on defendant Nos. 1 and 2 regarding plea of discharge is not fatal to the case. Therefore, when a finding has been recorded on appreciation of the evidence lead by the parties, omission to frame the issue does not vitiate the judgment."

Apex Court in the case of A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and Anr. [(2012) 6 SCC 430], the issues are required to be properly framed and as observed by the Apex Court, careful framing of issues is also helpful for proper examination.

ISSUE NOT RAISED ON PLEA - WENT TO TRIAL - ABANDONMENT OF PLEA

In the case of B.R. MULANI v. Dr. A.B. ASWATHANARAYANA AND OTHERS reported in MANU/KA/0034/1993 : AIR 1993 KARNATAKA 257; Party allowing the matter to be decided without raising issue in respect of certain plea - Party must be deemed to have abandoned plea. Whenever a party raises a plea and does not have the issue raised in that regard and goes to trial and have the matter decided without having an issue raised on the plea, the party must be deemed to have given up such a plea."

In the case of VEERABHADRAPPA v. BASHETTAPPA reported in ILR 1987 KARNATAKA 3873; Plea taken but issue not raised and trial gone through amounts to abandonment of Plea - Grievance thereof not at Second Appeal stage in the absence of any prejudice."

THE COURT MUST FIND OUT WHETHER IN SUBSTANCE THE PARTIES KNEW THE CASE AND THE ISSUES

Ram Sarup Gupta (Dead) By Lrs vs Bishun Narain Inter College & Ors 1987 AIR 1242, 1987 SCR (2) 805 In the absence of pleadings, evidence, if any, produced by the parties cannot be considered. No party should be permitted to travel beyond its pleadings and all necessary and material facts should

be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings, however, should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hairsplitting technicalities. Sometimes pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case, it is the duty of the Court to ascertain the substance of the pleadings, to determine the question. It is not desirable to place undue emphasis on form; instead, the substance of the pleadings should be considered. Whenever the question about lack of pleadings is raised, the enquiry should not be so much about the form of the pleadings; instead, the court must find out whether in substance the parties knew the case and the issues. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, it would not be open to a party to raise the question of absence of pleadings in appeal.

WHEN PARTIES KNOW FULLY THE OPPONENTS CASE – AND WENT TO TRIAL -ABSENCE OF ISSUE IS NO GROUND

Court in **Nedunuri Kameswaramma v. Sampati Subba Rao [AIR 1963 SC 884]**: "No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the

parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion." But the said observations were made in the context of absence of an issue, and not absence of pleadings.

PLEADINGS AND ISSUES GENERALLY COVER THE CASE SUBSEQUENTLY PUT FORWARD AND THAT THE PARTIES BEING CONSCIOUS OF THE ISSUE, HAD LED EVIDENCE ON SUCH ISSUE

Bachhaj Nahar vs Nilima Mandal & Ors. 2008 (15) SCALE 158

It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that

such case was at issue, the question of resorting to the exception to the general rule does not arise.

THE TRIAL SHOULD NOT PROCEED WHEN THERE IS NO CONTROVERSIAL OR TRIABLE ISSUE

In the case reported in **Smt.Patasibal and others ..vs.. Ratanlal (JT (1990) 3 SC 68)**, the Supreme Court has held thus:- "The trial should not proceed when there is no controversial issue but the trial Court failed to perform its duty and proceeded to issue summons without carefully reading the plaint. Since the plaint suffers from that fatal defect, the mere issuance of summons by the trial court did not require that the trial should proceed even when no triable issue is shown to arise; permitting the continuance of such a suit is tantamount to licensing frivolous and vexatious litigation, which cannot be done. The Supreme Court has also held that it is not necessary to adopt the technical course of directing the trial Court to make the consequential order of rejecting the plaint."

CONSOLIDATION OF SUITS IS ORDERED FOR MEETING THE ENDS OF JUSTICE AS IT SAVES THE PARTIES FROM MULTIPLICITY OF PROCEEDINGS, DELAY AND EXPENSES

M/s.Chitivalasa Jute Mills v. Jaypee Rewa Cement, (2004) 3 SCC 85, at page 89 : What is the cause of action alleged by one party as foundation for the relief prayed for and the decree sought for in one case is the ground of defence in the other case. The issues

arising for decision would be substantially common. Almost the same set of oral and documentary evidence would be needed to be adduced for the purpose of determining the issues of facts and law arising for decision in the two suits before two different courts. Thus, there will be duplication of recording of evidence if separate trials are held. Consolidation of suits but the same can be done under the inherent powers of the court flowing from Section 151 CPC. Unless specifically prohibited, the civil court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. The parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need to be addressed followed by one common judgment.

SECTION 151 OF THE CODE CANNOT BE ROUTINELY INVOKED FOR REOPENING EVIDENCE OR RECALLING WITNESSES - SCOPE OF 151 - SC 2011

K.K. Velusamy vs N. Palaanisamy 2011 (4) SCR 31 = 2011 (11) SCC 275 We however agree that section 151 of the Code cannot be routinely invoked for reopening

evidence or recalling witnesses. The scope of section 151 has been explained by this Court in several decisions (See : Padam Sen vs. State of UP-AIR 1961 SC 218; Manoharlal Chopra vs. Seth Hiralal - AIR 1962 SC 527; Arjun Singh vs. Mohindra Kumar - AIR 1964 SC 993; Ram Chand and Sons Sugar Mills (P) Ltd. vs. Kanhay Lal - AIR 1966 SC 1899; Nain Singh vs. Koonwarjee - 1970 (1) SCC 732; The Newabganj Sugar Mills Co.Ltd. vs. Union of India - AIR 1976 SC 1152; Jaipur Mineral Development Syndicate vs. Commissioner of Income Tax, New Delhi - AIR 1977 SC 1348; National Institute of Mental Health & Neuro Sciences vs. C Parameshwara - 2005 (2) SCC 256; and Vinod Seth vs. Devinder Bajaj - 2010 (8) SCC 1). We may summarize them as follows:

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code. (d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary,

when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

Balwant Singh And Ors. vs Dalip Kaur And Ors. AIR 1999 P H 93, The rules of Order 18 regulating the leading of additional evidence, rebuttal evidence and power of the Court to summon evidence at any stage must be construed and read in conjunction with each other to achieve the object of this procedural law. It is basic rule of law that where end of justice demands the procedural law should be construed liberally to achieve such ends rather than to scuffle the parties right at the trial stage and prevent them from leading complete evidence in support of their case. This would be more true in the cases where such evidence relates to the issue to be determined by the Court.

In Vinod Kumar and Ors. v. The State 1981 CrL. L. J. 927, the Delhi High Court held with reference to Section 73, 45 and 146 of Evidence Act that a prosecution witness in criminal trial cannot be called upon to get his voice tape recorded for comparison.

Yellappa By His Lrs vs Smt. Yashodabai AIR 2004 Kant 388, III (2004) BC 204, ILR 2003 KAR 3881 The provisions of Order VI Rule 14-A are mandatory and postulate a disastrous consequence to the party who does not furnish a correct and proper address. If the plaintiff furnishes incomplete, false or

fictitious address, the Court can stay the further proceedings of the suit and if the defendant commits fault in not giving the proper and correct address, the defence is to be struck off and the defendant is placed in a position as if he has not put up any defence. It is therefore necessary for the office at the stage of scrutiny of pleadings to insist the mentioning of proper and registered address and should raise necessary office objections before the file is sent to the Bench for further judicial consideration in the matter. In case of defendants/ respondents after their appearance in the written statement/ objections, it is to be insisted that defendants/respondent shall furnish correct and proper registered address. If such steps are taken at the initial stages, substantial volume of pendency at the process level could be eliminated.

COURTS INHERENT POWER INCLUDES POWER TO RECTIFY ITS MISTAKES

Jagannatha Shetty, J. in *State of Karnataka v. Balekal Krishna Bhat* ((1975) 2 Kant LJ 489) in which he affirmed an order made by the trial Court exercising the inherent Powers in setting aside the order of dismissal of a reference made under Section 18 of the Land Acquisition Act: "If the Court commits a mistake thereby causing injustice to any party before it, the Court would be under legal obligation to correct such mistake so as to render justice to the party. The power conferred by Section 151 is meant for that purpose."

Kariyanna vs Isthuri Subbaiahsetty And Ors. AIR 1981 Kant 234, 1981 (1) KarLJ 66 A Judge owes it to himself and the litigant public to correct his own mistake when once the same is brought to his notice and he will be failing in his duty if he does not do so and sticks to his previous order, as if he is infallible. A Judge should approach the same in all humility and rectify the mistake if he is convinced of the same.

NON FRAMING OF ANY ISSUE

Court in Nedunuri Kameswaramma v. Sampati Subba Rao [AIR 1963 SC 884]: "No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion."

Constitution Bench of this Court in Bhagwati Prasad vs. Shri Chandramaul - AIR 1966 SC 735 : "If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings

would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, though indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

Court in Ram Sarup Gupta (dead) by LRs., vs. Bishun Narain Inter College [AIR 1987 SC 1242]:

"It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The

object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the court to ascertain the substance if the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issue by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

Supreme Court in Bachhaj Nahar vs. Nilima Mandal and Anrs., (2008) 17 SCC 491 wherein the Supreme Court has examined the relevance and purpose of pleadings and issues, which is reproduced as hereunder:

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did

arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

WHEN RECASTED OPPORTUNITY BE GIVEN TO PARTIES

Karnataka High Court - Md.Abdul Majeed Khan S/O Md. Abdul ... vs Mohd.Abdul Jaleel Khan S/O Abdul ... on 6 January, 2012 If before writing a judgment issues have been recasted there should be some reasons for recasting of the issues. Application of mind, thinking process of the Judge is to be evidenced by an order of the Court. If at the time of writing the judgment if the learned Judge feels issues had to be recasted he has ample power to recast the issues, But, he owes a duty to bring it to the notice of the parties the issues which are recasted and give them an opportunity to adduce any evidence if they choose to do so and then only he can write the judgment on merits. If that procedure is not followed, not only the judgment is vitiated it offends the principles of natural justice. At any rate that is not the way a judicial authority should write while dealing with a regular suit. The procedure adopted by the trial Court is contrary to the settled principles and the provisions of CPC.

In the case of Perikal Malappa v. T. Venkatesh Gupta MANU/KA/8280/2006 : 2006 (5) Kar. L.J. 325 : ILR 2006 Kar. 3313; wherein Head Note reads as under:

"CODE OF CIVIL PROCEDURE, 1908, Order 14, Rule 5 -- Issues -- Trial Judge noticing that the issues framed by his predecessor was not based on the pleadings of the parties -- Learned Counsel for both parties heard-case reserved for judgment -- Trial Court framing additional issues at the stage of judgment without giving an opportunity for both the parties and gave its finding on the issues framed afresh-suit decreed -- Appealed against -- Held -- If the Court was of the opinion that issues have to be recanted and that the additional issues were to be framed, it was for the Court to frame issues and give an opportunity to both the parties. If the parties are willing to let in further evidence, an opportunity should be given to such party to lead their evidence. If both the parties are not willing to lead further evidence, after hearing the Learned Counsel for the parties on additional issues the Court could have disposed of the suit on merits. If, whenever additional issues are framed by a Court at the stage of judgment, it is the duty of the Court to hear the parties on additional issues and to proceed further in the matter. No Court is expected to proceed for judgment without giving an opportunity to the parties as it amounts to infringement of principles of natural justice (paras 15 and 16)".

BURDEN OF PROOF AND ISSUES

**P.S. Shivakumar vs. P.H. Subbarayappa and Ors.:
MANU/KA/0953/2017**

Civil - Recasting of issue - Validity thereof - Present petition filed against order whereby application for recasting issue filed by Respondent was allowed - Whether Trial Court was right in recasting of issue filed by Respondent - Held, it would disclose that Respondent had filed suit for partition and separate possession of suit properties contending that he was son of Petitioner - Issue was cast by Trial Court by casting burden on Respondent to prove that he was biological son of Petitioner - It was specifically pleaded by Petitioners that Respondent was not biological son of Petitioner - Trial Court ought not to have deleted issue and substituted same by recasting but on other hand it could have retained original issue which was framed and also framed additional issue which had now been recasted - Order under challenge required modification - Petition partly allowed.

Under Order 14 Rule 5 CPC the Court has power to amend the issues framed including framing of additional issue at any time before passing of a decree on such terms as it thinks fit, which in its opinion may be necessary for determining the matters in controversy between the parties. A bare reading of Order 14 Rule 1(1) CPC would indicate that when a material proposition of fact or law is affirmed by one party and denied by the other, then, an issue would arise for being framed. Whoever desires any Court to give a judgment as to any legal right dependent on the existence of facts which he asserts, must prove that those facts exist. ei

incumbit probatio qui dicit, non qui negat - The proof lies upon him who affirms, not upon him who denies. In other words, burden will lie on the party who asserts the fact to be taken note of by the Court in his favour and as such, burden shifts on the person so asserting. cum per rerum naturam factum negantis probatio nulla sit - Since by the nature of things he who denies a fact cannot produce any proof. In other words, a negative is usually incapable of proof.

Thus, onus is always on a person who asserts a proposition or fact, which is not self evident. For instance, to assert that a man who is alive was born requires no proof. The onus, is not on the person making the assertion, because it is self evident that he had been born. However, if he asserts that he had been born on a certain date or to a certain person, it requires proof, the onus would be on the person making such assertion.

The burden of proof cannot be held would always be static. It keeps oscillating and in the event of the initial burden cast on a person is discharged by tendering evidence in that regard, then automatically, the burden shifts on the other person to disprove the said fact and likewise, it shifts back to the person who originally asserted the said fact on other person discharging his burden by rebuttal evidence.

COURT FEE AND PRELIMINARY ISSUE

**Nagareshwar Devasthan Trust vs. Iranna Basanna
Karigoudar and Ors.: MANU/KA/3878/2015**

The main question that arises before this court is, whether after recording of the evidence, the court can treat the said issue as a preliminary issue, as per the provision under the Karnataka Court Fee and Suit Valuation Act (for short, KCF & SV Act). Section 11 (2) of the Act which only refers to all questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim.

5. On a plain reading of the above said provision, it is clear that, if a party to the proceedings seeks the court to treat the issue of court fee as a preliminary issue, then it is the duty of the court to see that, if any issue is framed with reference to the court fee, that shall be first heard and decided and thereafter, the court has to proceed to record the evidence. In this particular case, neither at the earliest point of time when the court has recorded the evidence of the parties, it has not treated the issue of court fee as a preliminary issue nor even after remitting the matter, the trial court also has not treated the issue of court fee, as a preliminary issue. It is a procedural irregularity on the part of the court in not following the mandatory provision, for that neither party is responsible. However, having come to know that the court has not treated any issue with regard to court fee and tried it as a preliminary issue, the defendants appears to have reminded the court by filing an application and bringing it to the knowledge of

the court about the responsibility of the court to treat the said issue as a preliminary issue prior to recording the evidence of the parties on merits. In that context, the court has refused to grant the remedy because of the reason that, the court as the Appellate Court, has directed the trial court to deal with the matter and dispose of the case within the specified time and also the trial court has observed that more than 22 years have already been elapsed and the suit is still pending. Therefore, it must have made its endeavor to dispose of the case at the earliest. In this regard, whether the delay in proceeding with the suit itself is sufficient to turn-down the prayer sought by the defendant or the responsibility of the court can be overlooked. In this regard, it is worth to look into the decision of this court in W.P. No. 82281/2011 in the case of Omprakash v. Narasinghjee since deceased by his LRs. In this case also, the court has observed that the court fee issue has not been properly considered. In the said decision, the case has been disposed of by the trial court in O.S. No. 24/2003 on 04.07.2011 and thereafter, the aggrieved party filed an appeal against the judgment and decree passed and the said case was remanded to the trial court once again. After remand, the defendants requested the court to treat the issue regarding court fee and jurisdiction, as a preliminary issue. That request was rejected on the ground that the suit was seven years old and also in the Review Meeting the District Judge has directed the concerned Judge to dispose of the old cases expeditiously. Therefore, on the request of the defendant's counsel considering the delay in filing the said suit, the said application came to be dismissed.

6. After considering the said factual matrix, this court relying upon the decision in the case of Veeragouda v. Shantakumar @ Shantappagowda [MANU/KA/0667/2008 : ILR 2009 KAR 887], had observed that,- "Even in matters which are more than seven years old, then though the directions have been issued by the High Courts or District Court to the trial court to dispose of the cases expeditiously, it cannot be disposed of contrary to law. Therefore, proper course open to the trial court to take-up such matters on day to day basis and dispose of the applications filed to treat the issue regarding court fee and jurisdiction as a preliminary point and then conduct trial on day to day basis but not to reject the application on the ground that it is an old matter..".

WHEN FRAMING AND NOT FRAMING OF ISSUES NOT FATAL

Muniyappa vs. Ramappa and Ors.: MANU/KA/0934/2015

Further, in the instant case, as noticed, the appellant had at the first instance not utilised the opportunity to tender evidence and at that stage approached this Court and had been permitted. He had thereafter taken part in the process of recording evidence. Either at that point or at any earlier point or later did the appellant complain about the inappropriateness of the issues framed nor had the appellant sought for recasting or framing additional issues. The parties have gone to trial fully being aware of the rival case. That apart, in the instant facts, the out and out case of the plaintiffs was that the suit schedule property was the

joint family property in which they are entitled to a share which cannot be deprived to them because of the sale made to defendant No. 13. Therefore, even if any other issue was required to be framed, the non-framing of the same would not be fatal to the case.

FRAMING OF PROPER ISSUES AND REMAND

A caution has been given by Court in Shantaveerappa Vs. K.N. Janardhanachari reported in MANU/KA/0721/2007 : ILR 2007 Kar 1127. Paragraph-10 of the said judgment at page No. 1133 is relevant and the same is extracted below: 10. In cases where the trial Court has omitted to frame or try any issue or to determine any question of fact, the Appellate Court if necessary frame issues and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required with a direction to return the evidence to the Appellate Court together with findings thereon and the reasons therefor within a time to be fixed by the Appellate Court. On receipt of such finding the Appellate Court may dispose of the appeal on merits. Here it would be a case of limited remand and not an open remand. In case where the Appellate Court feels issues have to be resettled and that the trial Court has proceeded wholly upon some ground other than that on which the Appellate Court proceeds, still the evidence upon the record is sufficient, the Appellate Court without resorting to an order of remand settle the issues and

pronounce judgment on merits on all issues. Therefore, it is clear the legislature has provided for all contingencies.

INHERENT POWERS TO DO COMPLETE JUSTICE

Court in Grindlays Bank Limited v. Income Tax Officer, Calcutta (1980) 2 SCC 191 observed as under:- “...When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstance that it has initiated a proceeding in the court, must be neutralised. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. ...”

In Ram Krishna Verma and Others v. State of U.P. and Others (1992) 2 SCC 620 Court observed as under:- “The 50 operators including the appellants/ private operators have been running their stage carriages by blatant abuse of the process of the court by delaying the hearing as directed in Jeevan Nath Bahl’s case and the High Court earlier thereto. As a fact, on the expiry of the initial period of grant after Sept. 29, 1959 they lost the right to obtain renewal or to ply their vehicles, as this Court declared the scheme to be operative. However, by sheer abuse of the process of law they are continuing to ply their vehicles pending hearing of the objections. This Court in Grindlays Bank

Ltd. vs Income-tax Officer - [1990] 2 SCC 191 held that the High Court while exercising its power under Article 226 the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised. It was further held that the institution of the litigation by it should not be permitted to confer an unfair advantage on the party responsible for it. In the light of that law and in view of the power under Article 142(1) of the Constitution this Court, while exercising its jurisdiction would do complete justice and neutralise the unfair advantage gained by the 50 operators including the appellants in dragging the litigation to run the stage carriages on the approved route or area or portion thereof and forfeited their right to hearing of the objections filed by them to the draft scheme dated Feb. 26, 1959. ...”

Court in Kavita Trehan vs Balsara Hygiene Products (1994) 5 SCC 380 observed as under— “The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words “Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, ...”. The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.”

Court in Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. and Another (1999) 2 SCC 325 observed as under:-

“From the narration of the facts, though it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Because of the delay unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also known fact that after obtaining a decree for possession of immovable property, its execution takes long time. In such a situation for protecting the interest of judgment creditor, it is necessary to pass appropriate order so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property. In appropriate cases, Court may appoint Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the plaintiff in whose favour decree is passed and to protect the property including further alienation.”

In Padmawati v. Harijan Sewak Sangh - CM (Main) No.449 of 2002 decided by the Delhi high Court on 6.11.2008, the court held as under:- “The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person.”

In Marshall sons and Company (I) Limited v. Sahi Oretrans (P) Limited and Another (1999) 2 SCC 325 Court in para 4 of the judgment observed as under: “...It is true that proceedings are dragged for a long time on one count or the other and, on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and a person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a

known fact that after obtaining a decree for possession of immovable property, its execution takes a long time. In such a situation, for protecting the interest of the judgment-creditor, it is necessary to pass appropriate orders so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property. In appropriate cases, the court may appoint a Receiver and direct the person who is holding over the property to act as an agent of the Receiver with a direction to deposit the royalty amount fixed by the Receiver or pass such other order which may meet the interest of justice. This may prevent further injury to the plaintiff in whose favour the decree is passed and to protect the property including further alienation. ...”

In Ouseph Mathai and Others v. M. Abdul Khadir (2002) 1 SCC 319 Court reiterated the legal position that the stay granted by the Court does not confer a right upon a party and it is granted always subject to the final result of the matter in the Court and at the risk and costs of the party obtaining the stay. After the dismissal, of the lis, the party concerned is relegated to the position which existed prior to the filing of the petition in the Court which had granted the stay. Grant of stay does not automatically amount to extension of a statutory protection.

Court in South Eastern Coalfields Limited v. State of M.P. and others (2003) 8 SCC 648 on examining the principle of restitution in para 26 of the judgment observed as under: “In our opinion, the principle of restitution takes care of this submission.

The word “restitution” in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see *Zafar Khan v. Board of Revenue, U.P - (1984) Supp SCC 505*) In law, the term “restitution” is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another.” “... ..Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.”

Court in Amarjeet Singh and Others v. Devi Ratan and Others (2010) 1 SCC 417 the Court in para 17 of the judgment observed

as under: “No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim *actus curiae neminem gravabit*, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court.”

COST OF SUIT - HAVE TO BE ACTUAL REASONABLE COSTS INCLUDING THE COST OF THE TIME SPENT BY THE SUCCESSFUL PARTY, THE TRANSPORTATION AND LODGING, IF ANY, OR ANY OTHER INCIDENTAL COST BESIDES THE PAYMENT OF THE COURT FEE, LAWYER'S FEE, TYPING AND OTHER COST IN RELATION TO THE LITIGATION

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

Sections 35, 35-A and 95 of the Code deal with three different aspects of award of cost and compensation. Under Section 95 cost can be awarded up to Rs. 50,000 and under Section 35-A, the costs awardable are up to Rs. 3,000. The award of the cost of the suit is in the discretion of the Court. In Sections 35 and 35-B, there is no upper limit of amount of cost awardable. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct the parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the Court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate Courts to follow.

PROPER COURT FEE WHEN SALE DEED ILLEGALITY SOUGHT

Court in *Suhrid Singh alias Sardool Singh v. Randhir Singh and Ors.* MANU/SC/0210/2010 : (2010) 12 SCC 112. In the said case, the Court referred to several elaborate prayers contained in the plaint and summarized the same. The Court took note of the fact that the issue had come before the trial court which had come to hold that prayers relating to the sale deeds amounted to seeking cancellation of the sale deeds and, therefore, ad valorem court fee was payable on the sale consideration in respect of the sale deeds. The said view was affirmed in the revision. The Court addressed the core issue pertaining to court fee payable in regard to the prayer for a declaration that the sale deeds were void and not "binding on the coparcenary", and for the consequential relief of joint possession and injunction. After referring to the provisions of the Court Fees Act, 1870 as amended in Punjab (as the controversy arose from the High Court of Punjab and Haryana), the Court held:

Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to

avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est/illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 Under Article 17(iii) of the Second Schedule of the Act. But if B, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee as provided Under Section 7(iv)(c) of the Act.

Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by Clause (v) of Section 7.

COURT FEE FOR RECOVERY OF POSSESSION WHEN ILLEGALLY DISPOSSESSED OF TENANT

Ramesh Srinivasa Jannu vs. Srinivas Vittoba Jannu and Ors.:
2000(4)KCCR2609 MANU/KA /0742/2000 - "For determining

the court fee payable on a plaint, the terminology used or the label given by the plaintiff is not of much significance. What is important to find out is the substance of the claim made in the plaint for adjudication".Where the suit is for establishing the right of occupancy of the plaintiff whether as a member of the joint family or as a legal heir of the deceased lessee or is meant to recover the immovable property from which he claims to have been illegally dispossessed consequent to illegal surrender of the leasehold rights by the original or the deceased lessee in favour of the lessor; the valuation of the suit and payment of court fee are governed by Section 41(d) and/or 41(e) and not under Sections 24 and 29 of the Karnataka Court Fees and Suits Valuation Act, 1958.

INHERENT POWERS OF COURT UNDER SECTION 151 CPC

Vinod Seth vs. Devinder Bajaj and Ors.:
MANU/SC/0424/2010 - Whether Court has inherent power under Section 151 to pass an Order directing the Appellant/Plaintiff in a suit for specific performance, to file an undertaking that in the event of not succeeding in the suit, he shall pay Rs. 25 lacs by way of damages to the Defendant - Held, Section 151 is not a provision of law conferring power to grant any kind of substantive relief rather it is a procedural provision saving the inherent power of the Court to make such Orders as may be necessary for the ends of justice - It cannot be used either to create or recognise rights, or to create liabilities and

obligations - In the present case, a suit or proceeding initiated in accordance with law, cannot be considered as an abuse of the process of Court, only on the ground that such suit or proceeding is likely to cause hardship or is likely to be rejected ultimately - As there are specific provisions in the Code, relating to costs, security for costs and damages, the Court cannot invoke Section 151 on the ground that the same is necessary for ends of justice - Thus, a Court trying a civil suit, cannot, in exercise of inherent power under Section 151 of the Code, make an interim Order directing the Plaintiff to file an undertaking that he will pay a sum directed by the Court to the Defendant as damages in case he fails in the suit - An Order Directing the Appellant/ Plaintiff to furnish an undertaking to pay Rs. 25 lacs to Defendants in the event of losing the case is punishing a litigant for approaching the Court, on the ground that the Court is not able to decide the case expeditiously, is unwarranted, unauthorised and beyond the power and jurisdiction of the Court in a civil suit governed by the Code.

Padam Sen v. State of Uttar Pradesh MANU/SC/0065/1960 : AIR 1961 SC 218, Court observed: The inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore it must be held that the court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature.....The inherent powers saved by Section

151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the courts for passing such orders which would affect such rights of a party.

In Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal MANU/SC/0056/1961 : AIR 1962 SC 527, Court held: ...that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in Section 151 itself. But those powers are not to be exercised when their exercised may be in conflict with what had been expressly provided in the Code or against the intentions of the legislature.

In Ram Chand and Sons Sugar Mills Pvt. Ltd. v. Kanhayalal Bhargav MANU/SC/0263/1966 : AIR 1966 SC 1899 Court reiterated that the inherent power of the court is in addition to and complementary to the powers expressly conferred under the Code but that power will not be exercised if its exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code. Section 151 however is not intended to create a new procedure or any new right or obligation.

In Nainsingh v. Koonwarjee MANU/SC/ 0426 /1970 : AIR 1970 SC 997, Court observed: Under the inherent power of Courts recognized by Section 151 CPC, a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of

the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code....

Supreme Court in K.K. Velusamy vs. N. Palanisamy, MANU/SC/0267/2011 : (2011) 11 SCC 275 has summarized the scope of Section 151 CPC. The relevant paras are as under:-

"12. The respondent contended that Section 151 cannot be used for reopening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that Section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of Section 151 has been explained by this Court in several decisions [see Padam Sen v. State of U.P. [MANU/SC/0065/1960 : AIR 1961 SC 218 : (1961) 1 Cri. LJ 322], Manohar Lal Chopra v. Seth Hiralal [MANU/SC/0056/1961 : AIR 1962 SC 527], Arjun Singh v. Mohindra Kumar [MANU/SC/0013/1963 : AIR 1964 SC 993], Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava [MANU/SC/0263/1966 : AIR 1966 SC 1899], Nain Singh v. Koonwarjee [MANU/SC/0426/1970 : (1970) 1 SCC 732], Newabganj Sugar Mills Co. Ltd. v. Union of India [MANU/SC/0045/1975 : (1976) 1 SCC 120: AIR 1976 SC 1152], Jaipur Mineral Development Syndicate v. CIT

[MANU/SC/0246/1976 : (1977) 1 SCC 508 : 1977 SCC (Tax) 208 : AIR 1977 SC 1348], National Institute of Mental Health & Neuro Sciences v. C. Parameshwara [MANU/SC/1063/2004 : (2005) 2 SCC 256] and Vinod Seth v. Devinder Bajaj [MANU/SC/0424/2010 : (2010) 8 SCC 1 : (2010) 3 SCC (Civ) 212]]. We may summarise them as follows:

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the

jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when

such exercise is to meet the ends of justice and to prevent abuse of process of court."

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Adv - Sridhara babu N

CHAPTER
EVIDENCE AND DOCUMENTS

PARTY WITHOLDING BEST PIECE OF EVIDENCE – ADVERSE INFERENCE CAN BE DRAWN

Apex Court's judgment in the case of **GOPAL KRISHNAJI KETKAR vs. MOHAMED HAJI LATIF AND OTHERS** reported in MANU/SC/0168/1969 : AIR 1968 SC 1413 wherein it is held that if a party cannot put the best evidence, which is in his possession and if he withholds the same from the Court, the necessary adverse inference has to be drawn against him.

THE FACTUM OF PARTITION WAS EVIDENCED BY ENTRIES IN THE RECORD OF RIGHTS

The case of **Digambar Adhar Patel v. Devram Girdhar Patil [Died] [1995 suppl (2) SCC 428]** is about record of rights and its functionary value vis-a-vis when the factum of partition was evidenced by entries in the Record of Rights, under the Hindu Law, it is not necessary that the partition should be effected by a registered partition deed.

EVIDENCE IN APPELLATE STAGE

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J., The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take

additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: *K. Venkataramiah v. A. Seetharama Reddy & Ors.*, AIR 1963 SC 1526; *The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors.*, AIR 1965 SC 1008; *Soonda Ram & Anr. v. Rameshwaralal & Anr.*, AIR 1975 SC 479; and *Syed Abdul Khader v. Rami Reddy & Ors.*, AIR 1979 SC 553).

The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: *Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co.*, AIR 1978 SC 798).

Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such

evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough compliance with the requirement as to recording of reasons.

It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice – delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: *State of Orissa v. Dhaniram Luhar*, AIR 2004 SC 1794; *State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi*, AIR 2008 SC 2026; *The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.*, AIR 2010 SC 1285; and *Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors.*, (2010) 13 SCC 336).

In *The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc.*, AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under: “We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence.” (Emphasis added) A similar view has been reiterated by this Court in *Basayya I. Mathad v. Rudrayya S. Mathad and Ors.*, AIR 2008 SC 1108.

A Constitution Bench of this Court in *K. Venkataramiah* (Supra), while dealing with the same issue held: “It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory.” (Emphasis added) In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

36. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be

allowed to be permitted on record such application may be allowed.

37. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the

Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053).

In Parsotim Thakur & Ors. v. Lal Mohar Thakur & Ors., AIR 1931 PC 143, it was held: “The provisions of S.107 as elucidated by O.41, R.27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Under R.27, Cl.(1) (b) it is only where the appellate Court “requires” it (i.e. finds it needful). The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but “when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent”, it may well be that the defect may be pointed out by a party, or that a party may move the Court to apply the defect, but the requirement must be the requirement of the court upon its appreciation of evidence as it stands. Wherever the Court adopts this procedure it is bound by R. 27(2) to record its reasons for so doing, and under R.29 must specify the points to which the evidence is to be confined and record on its

proceedings the points so specified. The power so conferred upon the Court by the Code ought to be very sparingly exercised and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case...” (Emphasis added) (See also: *Indirajit Pratab Sahi v. Amar Singh*, AIR 1928 P.C. 128)

In *Arjan Singh v. Kartar Singh & Ors.* (supra), this Court held: “.....If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent..... The order allowing the appellant to call the additional evidence is dated 17.8.1942. The appeal was heard on 24.4.1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing the judgment” (Emphasis added)

41. Thus, from the above, it is crystal clear that application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and

complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.

PROCEDURE FOLLOWED BEFORE REGISTERING A DOCUMENT

The Supreme Court in the case of **M.L. Abdul Jabbar Sahib Vs. H. Venkata Shastri and Sons and Others AIR 1969 SC 1147**), has held as below: "10. The Indian Registration Act, 1908 lays down a detailed procedure for registration of documents. The registering officer is under a duty to enquire whether the document is executed by the person by whom it purports to have been executed and to satisfy himself as to the identity of the executant: Section 34(3). He can register the document if he is satisfied about the identity of the person executing the document and if that person admits execution, [Section 35(1)]. The signatures of the executant and of every person examined with reference to the document are endorsed on the document, (Sec. 58). The registering officer is required to affix the date and his signature to the endorsements (Section 59). Prima facie, the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 of Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature"

PRESUMPTION OF DUE EXECUTION - CERTIFICATE ISSUED BY THE REGISTRAR IS TO SOME EXTENT EVIDENCE OF THE EXECUTION OF THE DOCUMENT - PRESUMPTION UNDER SECTION 89 - PROOF UNDER SECTION 69

Kallawwa Virupaxappa Banakar and Ors. vs. Bhagawwa and Ors.: MANU/KA/2167/2017

In regard to proving the execution of the will, the findings are that when both the attestors and the scribe were found to be dead, recourse could be had to Sections 58 to 60 of Registration Act, and that presumption under Section 90 of the Evidence Act could also be drawn as the impugned will was a 30 year old document. The trial Court referred to a judgment in the case of Gurbux Singh and Others Vs. Bishan Dass 'Chela' Kaul Dass and others (MANU/PH/0024/1970 : AIR 1970 P & H 182), where it has been held that certificate issued by the Registrar is to some extent evidence of the execution of the document, and admission of signature before the Registrar can form an evidence of the document. It also referred to some other decisions i) Hanumappa Bhimappa Koujageri Vs. Bhimappa Sangappa Asari (MANU/KA/0330/1995 : ILR 1996 KAR 1517), ii) Shiv Dass and others, Vs. Devki and others, (MANU/PH/0122/1978 : AIR 1978 P & H 285) iii) Kunhamina Umma and others, Vs. Special Tahsildar and others (AIR 1977 Kerala 41) to hold ultimately that since certification of the Sub -Registrar is available on the will, it could be inferred that the executor himself presented the document for registration and that the said certificate would suffice the proof with regard to execution. The trial Court also

gave a finding that the will was free from suspicious circumstances, and therefore, dismissed the plaintiff's suit.

In regard to proving a will, the law is well settled and there have been numerous decisions on that point. Will is generally a subject matter of dispute, as it comes into force only after the death of the testator; and probably for this reason, the strict requirement of law is to examine atleast one attesting witness according to Section 68 of the Evidence Act. The burden of proof is on the propounder of the will. It is very much necessary that the will must be proved by examining an attesting witness and if none of the attestors is available, Section 69 of the Evidence Act prescribes a procedure to be followed. Drawing of presumption under Section 90 of the Evidence Act must be last resort if execution of the will can be proved neither under Sections 68 nor 69 of the Evidence Act. The propounder, having found it impossible to prove the execution of the will by following the procedure as provided under Section 69 of the Evidence Act, can also rely upon the certificate of registration under Section 60 of the Registration Act, if the will is registered. The registration of the will does not create any presumption of its genuineness nor the Registrar's signature on the document can be treated on par with that the attestor's signature.

The Supreme Court in the case of M.L. Abdul Jabbar Sahib Vs. H. Venkata Shastri and Sons and Others (MANU/SC/0019/1969 : AIR 1969 SC 1147), has held as below: "10. The Indian Registration Act, 1908 lays down a detailed procedure for registration of documents. The registering officer is under a duty to enquire whether the document is executed by the

person by whom it purports to have been executed and to satisfy himself as to the identity of the executant: Section 34(3). He can register the document if he is satisfied about the identity of the person executing the document and if that person admits execution, [Section 35(1)]. The signatures of the executant and of every person examined with reference to the document are endorsed on the document, (Sec. 58). The registering officer is required to affix the date and his signature to the endorsements (Section 59). Prima facie, the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 of Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature"

Here, the trial Court applied Sections 58 to 60 of the Registration Act to draw inference about due execution of the will. The propounders of the will stated that the attestors and the scribe were dead. For this reason, proof of will as provided under Section 68 of the Evidence Act was not possible. Rightly the lower Courts below came to this conclusion. But, before referring to Sections 58 to 60 of the Registration Act, the trial Court did not examine whether the propounder had taken recourse to Section 69 of the Evidence Act. In that way, the Courts below are not legally justified to straight away referring to Sections 58 to 60 of the Registration Act, and therefore, substantial question of law needs to be answered negatively. This case can be examined from another angle also.

The learned counsel for the respondent referred to Section 89 of the Evidence Act which reads as below:- "89. Presumption

as to due execution, etc., of documents not produced - The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law."

The circumstance put forward is that defendant No. 3 was called upon to produce the original will, as she was also a beneficiary under the will and it should have been with her. There was no reason for the propounders to have not produced the will before the Court, if really they had custody of it, especially when they based their entire defence on that will. When defendant No. 3 did not produce it, and said that she did not have it, besides repudiating the will, her conduct appeared to be unconscionable; she might have taken such a stand to deprive defendant No. 4 of the property as according to her he was a stranger to the family. This is the observation of the First Appellate Court, and it is not improbable also. Therefore, when defendant No. 3 did not produce the will having had its custody, as it could be supposed, the presumption under Section 89 of the Evidence Act as regards attestation and execution of the will can be drawn.

There is another circumstance, which has been noticed by the Courts below. It is admitted fact that the plaintiff had filed a suit, O.S. No. 91/1982 for permanent injunction against defendant Nos. 4 and 5 in the present suit under appeal. In that suit, having noticed these defendants relying on the will dated 29/9/1961, made an attempt to amend her plaint to state that the said will had been cancelled. The Court did not permit that amendment, but notwithstanding that, it provides a ground to

infer that the plaintiff had the knowledge about execution of a will by her father. Here in this case, the plaintiff may have stated that the said will is concocted, but her previous statement in her application made in the earlier suit not only precluded her, but also P.W. 1, a legal representative of the plaintiff from taking contrary stand. The trial Court has observed that the previous statement could not be duly proved through the plaintiff by bringing that statement to her notice as she was dead by the time recording of evidence commenced. But, such requirement as to bring to notice of the plaintiff or P.W. 1 was not necessary since in the plaint itself, it has been specifically stated that the plaintiff wanted to amend her plaint in her previous suit. This averment in the plaint amounts to an admission under Section 58 of the Evidence Act and reasonable inferences may be drawn that it was within the knowledge of the plaintiff that her father had executed a will which had been cancelled according to her. The plaintiff or her legal representative should have proved the cancellation of the will if at all the suit had to be decreed in their favour. This having not been done, the specific defence taken by defendant Nos. 4 and 5 becomes acceptable. Therefore, in the set of circumstances of this case, there is preponderance in the case put forth by the defendant Nos. 4 and 5, although execution of the will has not been proved in accordance with Section 69 of the Evidence Act.

WHEN CONTENTS OF THE DOCUMENT AND EXECUTION OF THE DOCUMENT THOUGH ADMITTED BY THE PLAINTIFF HE WANTS TO DEVIATE FROM PORTION OF THE CONTENTS

Umarsab vs. Shakera Banu and Ors.:

MANU/KA/2168/2017.....If the Court comes to the conclusion that the burden casts upon the plaintiff is satisfactorily discharged, then only the Court has to shift the onus on the defendants in order to disprove the case of the plaintiff, tentatively proved by the plaintiff. It is the duty of the plaintiff to establish before the Court that he has only executed the sale deed in favour of the defendant No. 1 with only intention to sell part of the survey number (two acres only). He cannot do so without admitting the document itself, as rightly observed by the trial Court and First Appellate Court. There is presumption in favour of the defendants with regard to the registered sale deed and contents thereon, when it is not specifically denied by the plaintiff that, he never executed the sale deed in favour of the defendant No. 1. It is his case that, he only intended to sell part of said survey number in favour of the defendant No. 1. Therefore, it goes to show that the contents of the said document and execution of the document though admitted by the plaintiff he wants to deviate from portion of the contents of the document in respect of the extent of the land. In order to establish it, the plaintiff has led evidence and he has produced record of right and mutation register extract. All documents show that, the necessary mutation has been accepted and records have made in the name of the defendant. In order to establish the intention of the parties the Court has to first look into the contents of the document itself. Because Indian Evidence Act, enumerates regarding the execution of oral evidence with regard to the

contents of the document. When document itself is admitted, as a primary evidence contemporary of contrary circumstances have to be established by the parties to take up contentions in order to rebut the presumption raised in favour of the sale deed holder. The contents of the document discloses, the real intention of the parties for the purpose of entering into sale deed expressed therein. Thereafter the necessity of executing the sale deeds in favour of the opposite party. The execution of the document is made in presence of the witnesses before the Sub-Registrar. The plaintiff himself stated in the pleadings that he had sold the property for his family necessity. When he admitted the sale deed and his intention is expressed in the document itself, merely, because some oral evidence is adduced by the plaintiff the same cannot be simply accepted unless the evidence is of such a nature that, even if it is accepted, even an ordinary prudent man should say that the document is void and the document could not have been executed by the said person. If existence of such surrounding circumstances are not shown the presumption cannot be said to have been rebutted. All these factual aspects with regard to the execution of the sale deed, and the contents of the said document, passing of the ownership under Section 54 of Transfer of Property Act legal consequential thereon are all discussed with reference to the pleadings and evidence of the parties. The intention of the parties shows that, the major portion of the land had been sold by plaintiff and purchased by the defendant, in my opinion the said transaction is based factual aspects. The appreciation of such facts by the trial Court and the First Appellate Court, if concurrent normally it should not be

disturbed, unless the said appreciation by the courts is without there being any evidence or it is only on the basis of imagination of the courts. Even the appreciation of the facts pleaded and evidence addressed by the parties is erroneous, if such erroneous findings is concurrent in nature then also this Court should not interfere with such appreciation of facts. The parties have in fact led the oral evidence with reference to their pleadings and the Courts below have appreciated the same. It is not pointed out before this Court that there is no evidence before the trial Court and the trial Court has imagined such evidence and given findings and drawn inference. It is also not pointed out to the Court that, there is a material evidence by the parties and the same has not been looked into or ignored by the trial Court and the First Appellate Court and drawn the inference as against the evidence. If such materials are not available, even erroneous findings on facts cannot be interfered by the Court, unless the Court itself finds that there is a miscarriage of justice by such erroneous appreciation in such manner. On careful perusal of the appreciation of the evidence by the both the Courts, I do not find any strong reason to come to any other conclusion except the one recorded by the trial Court and the First Appellate Court. It cannot be said that by means of such oral evidence the plaintiff has rebutted the strong presumption arising out of the sale deed executed in favour of the defendant No. 1. When once the sale deed is executed, it vests the complete right, title and interest over the property in favour of the plaintiff. In order to divest the said vested right, there must be impeccable un-controverted materials on record which are conspicuously absent in the case.

RELINQUISHMENT OF RIGHT ONLY THROUGH REGISTERED DOCUMENT

Sneh Gupta v. Devi Sarup and others [(2009) 6 SCC 194] It is also not a case where the compromise can be said to be a family arrangement. A family arrangement must be entered into by all the parties thereto. Compliance of the requirements laid down in Order XXIII, Rule 3 of the Code of Civil Procedure is imperative in character. A compromise or satisfaction must satisfy the conditions of a lawful agreement. Title to a property must be determined in terms of the statutory provision. If by reason of the provisions of the Hindu Succession Act, 1956 the appellant herein had derived title to the property along with her brothers and sisters, she cannot be deprived thereof by reason of an agreement entered into by and between the original plaintiff and the contesting defendants. If a party furthermore relinquishes his or her right in a property, the same must be done by a registered instrument in terms of the provisions of Indian Registration Act.

WHETHER NOT FILING A DOCUMENT IN REBUTTAL OF A DOCUMENT AMOUNTS TO AN ADMISSION

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J., The question does arise as to whether not filing a document in rebuttal of a document amounts to an admission and whether the provisions of Section 58 of the

Evidence Act are attracted. Order XII CPC deals with admission of the case, admission of the documents and judgment on admissions. Rule 1 thereof provides that a party to a suit may give notice by his pleading or otherwise in writing that he admits the truth of the whole or any party of the case of any other party. Rule 2 deals with notice to admit documents – it provides that each party may call upon the other party to admit within 7 days from the date of service of the notice of any document saving all such exceptions. Rule 2A provides that a document could be deemed to have been admitted if not denied after service of notice to admit documents.

Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. (Vide: *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors.*, AIR 1960 SC 100; *Basant Singh v. Janki Singh & Ors.*, AIR 1967 SC 341; *Sita Ram Bhau Patil v. Ramchandra Nago Patil*, AIR 1977 SC 1712; *Sushil Kumar v. Rakesh Kumar*, AIR 2004 SC 230; *United Indian Insurance Co Ltd. v. Samir Chandra Choudhary.*, (2005) 5 SCC

784; Charanjit lal Mehra & Ors v. Kamal Saroj Mahajan & Anr., AIR 2005 SC 2765; and Udham Singh v. Ram Singh & Anr., (2007) 15 SCC 529.)

In Nagubai Ammal & Ors. v. B.Shama Rao & Ors., AIR 1956 SC 593, Court held that admission made by a party is admissible and best evidence, unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the judgment in Slatterie v. Pooley, (1840) 6 M & W 664, wherein it had been observed “What a party himself admits to be true, may reasonably be presumed to be so.”

In L.I.C of India & Anr v. Ram Pal Singh Bisen, (2010) 4 SCC 491, Court held that “failure to prove the defence does not amount to an admission, nor does it reverse or discharge the burden of proof of the plaintiff.”

In view of the above, the law on the admissions can be summarised to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff.

In the instant case, the Court held that not filing any document in rebuttal of the Will dated 1.3.1929 amounts to admission of the said Will as well as its contents. Without following the procedure as required under Order XII CPC or admission having not been made during the course of hearing before the Court, the question of application of Section 58 of the Evidence Act could not arise. Section 58 provides that a fact may not need to be proved in any proceeding which the parties thereto agreed to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands or which they admitted by their pleading, even in that case court may, in its discretion, even if such a admission has been made by the party, require the fact admitted to be proved otherwise than by such admission. In fact, admission by a party may be oral or in writing. 'Admissions' are governed under Sections 17 to 31 of the Evidence Act and such admission can be tendered and accepted as substantive evidence. While admission for purposes of trial may dispense with proof of a particular fact. Section 58 deals with admissions during trial i.e. at or before the hearing, which are known as judicial admissions or stipulations dispense it with proof. Admissions are not conclusive proof but may operate as estoppel against its maker. Documents are necessarily either proved by witness or marked on admission.

In view of above, it is evident that the first appellate court has misdirected itself so far as the issue of admission is concerned. The finding recorded by it that appellant/defendant No.1 failed to produce any document in rebuttal of the Will is not only wrong but preposterous.

ADVERSE INFERENCE AND ADMISSION

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , MANU/SC/0561/2012 - 2012 (8) SCC 148. Dr. B. S. CHAUHAN, J., Generally, it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114(g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. (Vide: Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6; Hiralal & Ors. v. Badkulal & Ors., AIR 1953 SC 225; A. Raghavamma & Anr. v. A. Chenchamma & Anr., AIR 1964 SC 136; The Union of India v. Mahadeolal Prabhu Dayal, AIR 1965 SC 1755; Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1968 SC 1413; M/s. Bharat Heavy Electrical Ltd. v. State of U.P. & Ors., AIR 2003 SC 3024; Musauddin Ahmed v. State of Assam, AIR 2010 SC 3813; and Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr., (2011) 9 SCC 126).

Mt. Bilas Kunwar v. Desraj Ranjit Singh, AIR 1915 PC 96, a view has been expressed that it is open to a litigant to refrain from producing any document that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for interrogatories/inspections and production of documents. If he fails to do so, neither he nor the Court at his suggestion, is

entitled to draw any inference as to the contents of any such documents.

In Kamma Otukunta Ram Naidu v. Chereddy Pedda Subba Reddy & Ors., AIR 2003 SC 3342, Court held that all the pros and cons must be examined before drawing an adverse inference against a party. In that case the issue had been, as to whether two persons had been travelling together in the vehicle and presumption had been drawn only on the basis that the bus tickets of both the persons were not produced. This Court held that presumption could not have been drawn if other larger evidence was shown to the contrary. (See also: *Mohinder Kaur v. Kusam Anand*, (2000) 4 SCC 214; and *Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors.*, AIR 2001 SC 2328).

In Municipal Corporation, Faridabad v. Siri Niwas, AIR 2004 SC 4681, Court has taken the view that the law laid down by this Court in *Gopal Krishnaji Ketkar* (supra) did not lay down any law, that in all situations the presumption in terms of clause (g) of Section 114 of the Evidence Act must be drawn.

In Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das & Anr., AIR 1967 SC 256, Court held that mere withholding of documentary evidence by a party is not enough to draw adverse inference against him. The other party must ask the party in possession of such evidence to produce the same, and in case the party in possession does not produce it, adverse inference may be drawn: "It is true that the defendant-respondent also did not call

upon the plaintiff-appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff and that therefore, strictly speaking, no inference adverse to the plaintiff can be drawn from his non-producing the list of documents. The Court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent case.”

In Ramrati Kuer v. Dwarika Prasad Singh & Ors., AIR 1967 SC 1134, Court held: “It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. An adverse inference could only have been drawn against the plaintiffs-respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts.” (See also: Ravi Yashwant Bhoir v. District Collector, Raigad & Ors., AIR 2012 SC 1339).

In Smt. Indira Kaur & Ors. v. Shri Sheo Lal Kapoor, AIR 1988 SC 1074, the lower courts drew an adverse inference against the appellant- plaintiff on the ground that the plaintiff was not ready

and willing to perform his part of the contract. The question arose as to whether the party had the means to pay. The court further held that before the adverse inference is drawn against a particular party, the conduct and diligence of the other party is also to be examined. Where a person deposed that as he had deposited the money in the Bank and the other party did not even ask as on what date and in which Bank the amount had been deposited and did not remain diligent enough, the question of drawing adverse inference against such a person for not producing the Pass Book etc. cannot be drawn.

In Mahendra L. Jain & Ors. v. Indore Development Authority & Ors., (2005) 1 SCC 639, Court held that mere non-production of documents would not result in adverse inference. If a document was called for in the absence of any pleadings, the same was not relevant. An adverse inference need not necessarily be drawn only because it would be lawful to do so.

In Manager, R.B.I., Bangalore v. S. Mani & Ors., AIR 2005 SC 2179, Court dealt with the issue wherein the Industrial Tribunal directed the employer to produce the attendance register in respect of the first party workmen. The explanation of the appellant was that the attendance registers being very old, could not be produced. The Tribunal, however, in its award noticed the same and drew an adverse inference against the appellants for non-production of the attendance register alone. This Court reversed the finding observing: "As noticed hereinbefore, in this case also the respondents did not adduce any evidence

whatsoever. Thus, in the facts and circumstances of the case, the Tribunal erred in drawing an adverse inference.

The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service” (See also: A. Jayachandra v. Aneel Kaur, AIR 2005 SC 534; R.M. Yellatti v. Assistant Executive Engineer AIR 2006 SC 355; and Pratap Singh & Anr. v. State of M.P., AIR 2006 SC 514).

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J., Order XI CPC contains certain provisions with the object to save expense by obtaining information as to material facts and to obtain admission of any fact which he has to prove on any issue. Therefore, a party has a right to submit interrogatories relating to the same matter in issue. The expression “matter” means a question or issue in dispute in the action and not the thing about which such dispute arises. The object of introducing such provision is to secure all material documents and to put an end to protracted enquiry with respect to document/material in possession of the other party. In such a fact-situation, no adverse inference can be drawn against a party for non-production of a document unless notice is served and procedure is followed. Under Rule 14 of Order XI, the court is competent to direct any party to produce the document asked by the other party which is in his possession or power and relating to any material in question in such suit. Rule 15 Order XI

provides for inspection of documents referred to in pleadings or affidavits. Rule 18 thereof, empowers the court to issue order for inspection. Rule 21 thereof provides for very stringent consequences for non-compliance with the order of discovery, as in view of the said provisions in case the party fails to comply with any order to answer interrogatories or for discovery or inspection of documents, he shall, if he is a plaintiff, be liable to have his suit dismissed for want of prosecution and if he is a defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect. Thus, in view of the above, the suit may be dismissed for non-compliance of the aforesaid orders by the plaintiff and the plaintiff shall also be precluded from bringing a fresh suit on the same cause of action. Similarly, defence of the defendant may be struck off for non-compliance of such orders.

Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and

diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary.

**PLAINTIFF SHOULD PROVE HIS CASE NOT ENTITLED TO
DEPEND UPON THE WEAKNESS OF DEFENDANT**

Hon'ble Supreme Court has held in the case of UNION OF INDIA AND OTHERS v. VASAVI COOPERATIVE HOUSING SOCIETY LIMITED AND OTHERS, reported in MANU/SC/0001/2014 : (2014) 2 SCC 269, that the plaintiff should win the case by proving his case; he cannot win the case on the weakness of his adversary.

**IF AGREEMENT HAVING DOUBLE MEANING ONE WHICH IS
LAWFUL SHOULD BE PREFERRED**

**Hon'ble Supreme Court in the case of Delta International Ltd.
vs. Shyam Sundar Ganeriwalla and Another reported in**

MANU/SC/0258/1999 : (1999) 4 SCC 545 wherein it has been held that the intention of the parties is the meaning of the words used where terms of the agreement are vague or having double meaning one which is lawful should be preferred.

FAMILY SETTLEMENT NOT REQUIRED TO BE REGISTERED

The case of **Kale & Ors. v. Deputy Director of Consolidation & Ors. [(1976)3 SCC 119]** is about family arrangement not required to be registered and para 10 about binding fact and essential about family settlement and certain propositions emerged therein.

WHAT TRANSPIRED AT THE HEARING, THE RECORD IN THE JUDGMENT OF THE COURT ARE CONCLUSIVE OF THE FACTS SO STATED

It has to be noted that the statement of as to what transpired at the hearing, the record in the judgment of the Court are conclusive of the facts so stated and no one can contradict such statement on affidavit or by other evidence. If a party thinks that the happenings in Court have been erroneously recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges who have made record to make necessary rectification. That is only way to have the record corrected. It is not open to the appellant to contend before this Court to the contrary. (See *State of Maharashtra v. Ramdas Shrinivas Nayak and Anr.* (1982 (2) SCC 463), Bhavnagar

University v. Palitana Sugar Mill (P) Ltd. and Ors. (2003 (2) SCC 111), and Roop Kumar v. Mohan Thedani 2003 (6) SCC 595).

IF A PARTY SAYS WHAT WAS RECORDED WAS ERRONEOUS, THE PARTY SHOULD APPROACH THE CONCERNED COURT FOR MAKING ANY RECTIFICATION 2004 SC

In the decision RAM BALI VS STATE OF U.P. reported in 2004 10 SCC 598, 2004 AIR 2329 the Hon'ble Supreme Court, in paragraph 9 of the said judgment, has held that where the High Court has specifically recorded to the effect that only two points were urged before it, in order to ascertain as to what transpired in the Court, the record in the judgment of the Court should be taken as a conclusive proof and no one should be allowed to contradict such statement on an affidavit or by other evidence. It was further held that if a party wanted to take a stand that what was recorded was erroneous, the party should approach the concerned Court for making any rectification and it is not open to the party to contend contrary to what has been recorded before the Hon'ble Supreme Court.

APPELLATE COURT MAY PERMIT HIM IN RARE AND APPROPRIATE CASES TO RESILE FROM A CONCESSION WAS MADE ON A WRONG APPRECIATION OF THE LAW AND HAD LED TO GROSS INJUSTICE

In the decision **ROOP KUMAR VS MOHAN THEDANI reported in AIR 1982 SC 1249**, the Hon'ble Supreme Court, while

reiterating the said position, however, carved out an exception, which reads as under:-. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

In the decision reported in **AIR 2003 SC 2418**, it was again reiterated in paragraph No.11 that it is not open to a party to turn around and take a plea that no concession was given. which would amount to a case of sitting on the fence, which should not be encouraged. It was again stated that if really there was no concession, the only course open to the party was to move the concerned Court and not by approaching the appellate court.

COURTS SHOULD LEAVE THE DECISIONS ON ACADEMIC MATTERS TO EXPERTS

It is also a well settled principle of law that, courts should leave the decisions on academic matters to experts who are more familiar with the problems faced. In this behalf the Supreme Court while following its earlier decision of the Constitution Bench in *University of Mysore and Anr. v. C.D. Govinda Rao and Anr.*, AIR 1965 SC 491 has held in *Tariq Islam v. Aligarh Muslim University & Ors.* (2001) 8 SCC 546 that "normally it is wise and safe for the courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the courts generally are". Similar view has been expressed in

several decisions in *Dr. Uma Kant v. Dr. Bhika Lal Jain*, JT 1991 (4) SC 75; *Bhushan Uttam Khare v. The Dean, B.J. Medical College & Ors.*, JT 1992 (1) SC 583; *Rajender Prasad Mathur v. Karnataka University & Anr.*, AIR 1986 SC 1448; *P.M. Bhargava & Ors. v. U.G.C. & Anr.*, 2004 (6) SCC 661; *Chairman, J&K State Board of Education v. Feyaz Ahmed Malik & Ors.*, (2000) 3 SCC 59; *Varanaseya Sanskrit Vishwavidyalaya & Anr. v. Dr. Rajkishore Tripathi & Anr.*, (1977) 1 SCC 279; *Medical Council of India v. Sarang & Ors.*, (2001) 8 SCC 427; and *Bhagwan Singh & Anr. v. State of Punjab & Ors.*, (1999) 9 SCC 573.

PRESUMPTION UNDER SECTION 114 OF THE EVIDENCE ACT AGAINST A PARTY WHO DID NOT ENTER INTO THE WITNESS BOX

In ***Vidhyadhar v. Manikrao*** AIR 1999 SC 1441, the Supreme Court after referring to a large number of decisions on the question of adverse inference held as under: Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Gubaksha Singh v. Gurdial Singh*, AIR 1927 PC 230. This was followed by the Lahore High Court in *Kirpa Singh v. Ajaipal Singh*, AIR 1930 Lahore 1, and the Bombay High Court in *Martand Pandharinath Chaudhri v. Radhabai Krishnarao Deshmukh*, AIR 1931 Bombay 97. The

Madhya Pradesh High Court in *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat*, also followed the Privy Council decision in *Sardar Gurbakhsh Singh's case* (AIR 1927 PC 230) (supra). The Allahabad High Court in *Arjun Singh v. Virender Nath*, , held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Doss v. Bhishan Chand*, , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.

POWER OF ATTORNEY HOLDER CANNOT DEPOSE FOR THE PRINCIPAL FOR THE ACTS DONE BY THE PRINCIPAL

Apex Court in ***Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Ltd and Ors.*** 2005 SAR (Civil) 103, 2004 AIR SCW 7064, wherein it is held that power of attorney holder - can appear, apply and act in any court on behalf of principal but such act cannot be extended to depose in the witness box in place of principal - if the power of attorney holder has rendered some acts in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him - he cannot depose for the principal in respect of the matter which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross examined.

ADVERSE INFERENCE MAY NOT BE DRAWN WHERE THERE WAS NO OCCASION FOR THE PARTY TO ADDUCE EVIDENCE

In **Smt. Indira Kaur v. Shri Sheo Lal Kapoor AIR 1988 SC 1074** and *Mohinder Kaur v. Kusam Anand* (2000) 4 SCC 214, the honourable Supreme Court held that adverse inference may not be drawn where there was no occasion for the party to adduce evidence. Adverse inference can be drawn provided a party is required to lead evidence or has been directed to produce the same in view of the specific averment made by the other party and the document was in its possession.

In **Kamma Otukunta Ram Naidu v. Chereddy Pedda Subba Reddy & Ors., AIR 2003 SC 3342**, Court held that all the pros and cons must be examined before drawing an adverse inference against a party. In that case the issue had been, as to whether two persons had been travelling together in the vehicle and presumption had been drawn only on the basis that the bus tickets of both the persons were not produced. This Court held that presumption could not have been drawn if other larger evidence was shown to the contrary. (See also: *Mohinder Kaur v. Kusam Anand*, (2000) 4 SCC 214; and *Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors.*, AIR 2001 SC 2328).

In **Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das & Anr., AIR 1967 SC 256**, Court held that mere withholding of documentary evidence by a party is not enough to draw adverse inference against him. The other party must ask the party in possession of such evidence to produce the same, and in case the party in possession does not produce it, adverse inference may be

drawn: “It is true that the defendant-respondent also did not call upon the plaintiff-appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff and that therefore, strictly speaking, no inference adverse to the plaintiff can be drawn from his non-producing the list of documents. The Court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent case.”

In Ramrati Kuer v. Dwarika Prasad Singh & Ors., AIR 1967 SC 1134, Court held: “It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. An adverse inference could only have been drawn against the plaintiffs-respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts.” (See also: Ravi Yashwant Bhoir v. District Collector, Raigad & Ors., AIR 2012 SC 1339).

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appellant- plaintiff on the ground that the plaintiff was not ready and willing to perform his part of the contract. The question arose as to whether the party had the means to pay. The court further held that before the adverse inference is drawn against a particular party, the conduct and diligence of the other party is also to be examined. Where a person deposed that as he had deposited the money in the Bank and the other party did not even ask as on what date and in which Bank the amount had been deposited and did not remain diligent enough, the question of drawing adverse inference against such a person for not producing the Pass Book etc. cannot be drawn.

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ALL OFFICIAL ACTS ARE PRESUMED TO BE DONE AS PER LAW – PARTY ALLEGATING ILLEGALITY HAS TO PROVE IT

Supreme Court in **Gopal Narain v. State of Uttar Pradesh AIR 1964 SC 370**, held that there is a presumption when a statutory authority makes an order, that it has followed the prescribed procedure and such a presumption can only be rebutted by adducing appropriate evidence. However, the party, which makes an allegation that the act has not regularly been performed, the

onus to prove lies upon him that the proper procedure has not been followed or the act has not been performed as was required under the law.

In Maharaja Pratap Singh Bahadur v. Thakur Manmohan Dey AIR 1966 SC 1931, the honourable Supreme Court considered the scope of illustration (e) of Section 114 of the Evidence Act and the question was : whether the Deputy Commissioner, who performed the particular function, had even been authorised to act. The court held that if an official act is proved to have been done, it will be presumed to have been regularly done and in such an eventuality and circumstances, the court can reasonably presume that the Deputy Commissioner, under appropriate rules, was duly authorised to act on behalf of the authority concerned.

A Constitution Bench of the honourable **Supreme Court, in State of Punjab v. Satya Pal Dang AIR 1969 SC 903**, dealt with the prorogation issued by the Governor. The court observed as under : "We are bound to take judicial notice of the prorogation and presume the regularity of these actions which must be interpreted as far as possible so that the thing done may be valid rather than invalid."

In **Narayan Govind Gavate v. State of Maharashtra AIR 1977 SC 183**, the honourable Supreme Court observed that presumption provided in illustration (e) of Section 114 of the Evidence Act is based on well-known maxim of law "omnia praesumuntur rite esse acta" (i.e., all acts are presumed to have

been rightly and regularly done). The court further held, this presumption is, however, one of the fact. It is an optional presumption can be displaced by the circumstances indicating that the power lodged in an authority or official has not been exercised in accordance with law.

STATEMENTS OR DECLARATIONS BEFORE PERSONS OF COMPETENT KNOWLEDGE MADE ANTE LITEM MOTAM ARE RECEIVABLE TO PROVE ANCIENT RIGHTS OF A PUBLIC OR GENERAL NATURE

In **State of Bihar and Ors. v. Sri Radha Krishna Singh and Ors., 1983 AIR 684**, 1983 SCR (2) 808 the Hon'ble Supreme Court, while considering the scope of provisions of Sections 13 and 41 to 43 of the Act, to prove the admissibility of the earlier judgment, observed as under: It is also well settled that statements or declarations before persons of competent knowledge made ante litem motam are receivable to prove ancient rights of a public or general nature. The admissibility of such declarations is, however, considerably weakened if it pertains not to public rights but to purely private rights. It is equally well settled that declarations or statements made post litem motam would not be admissible because in cases or proceedings taken or declarations made ante litem motam, the element of bias and concoction is eliminated. Before, however, the statements of the nature mentioned above can be admissible as being ante litem motam they must not only be before the actual existence of any controversy, but should be

made even before the commencement of legal proceedings. This position however cannot hold good of statements made post litem motam which would be clearly inadmissible in evidence. The reason for this rule seems to be that after a dispute has begun or a legal proceeding is about to commence, the possibility of bias, concoction or putting up false pleas cannot be ruled out.

(i) A judgment in rem e.g, judgments or orders passed in admiralty, probate proceedings, etc, would always be admissible irrespective of whether they are inter partes or not;

(ii) judgment in personam not inter partes are not at all admissible in evidence except for the three purposes mentioned above.

(iii) on a parity of aforesaid reasoning, the recitals In a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly in admissible in a case where neither the plaintiffs nor the defendants were parties.

(iv) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety. is precious little.

(v) Statements, declarations or depositions, etc., would not be admissible if they are post litem motam

PROPER APPRECIATION OF DOCUMENTS AND EVIDENCE

THE HON'BLE MR. JUSTICE SUBHASH B. ADI of Karnataka High Court in the case of **R Laxman vs M S Lingegowda Since Dead By Lrs** Decided on 13 February, 2013

No doubt, the pleadings in the plaint do not show that the plaintiff has stated the source of his title to the suit schedule property. The entire pleadings show that the plaintiff has based his claim only on the basis of the revenue records. However, during the course of his evidence, he sought to produce Ex.P20, which stands in the name of the uncle of the plaintiff and he claimed that, there was subsequent partition and the suit schedule property had fallen to his share, however, such a pleading is not forthcoming in the plaint. However, the plaintiff admittedly, has produced Exs.P1 to P6 and it shows the plaintiff's name in the cultivator's column and in the kabzedar's column, the name of the brother of the plaintiff is shown. Under Section 133 of the Karnataka Land Revenue Act, the entries in the revenue records create presumption that they are true, unless rebuttable evidence is led. Ex.D2 is a pahani, wherein the name of defendant No.4, one of the legal representatives of the original defendant is shown in the cultivator's column. It is not known as to how for the first time in 1982-1983, the name of defendant No.4 is entered. The trial Court, without referring to the entries in the said documents and without referring to Survey Nos., only on the ground that there was an order passed by the Appellate Tribunal against the brother of the plaintiff, has dismissed the suit. In my opinion, the trial Court has utterly failed to appreciate the evidence on record in the proper perspective. When there is a dispute between the parties, the better title between the parties has to be ascertained and to appreciate the same, the trial Court should have looked into the oral as well as the documentary evidence of both the

parties. Even the documents referred to by the trial Court have been wrongly understood.

IF HE WITHHOLDS A VITAL DOCUMENT IN ORDER TO GAIN ADVANTAGE AGAINST THE OTHER SIDE, THEN HE WOULD BE GUILTY OF PLAYING FRAUD ON THE COURT

In the decision, **S.P.Chengalvaraya Naidu vs. Jagannath, reported in 1994 (1) SCC 1**, the Hon'ble Supreme Court has held that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to decide the litigation and if he withholds a vital document in order to gain advantage against the other side, then he would be guilty of playing fraud on the court as well as on the opposite party.

ALTHOUGH NEGLIGENCE IS NOT FRAUD BUT IT CAN BE EVIDENCE ON FRAUD

Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education and Ors. reported in JT 2003 (Supp. 1) SC 25 held: "Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either

by words or letter. Although negligence is not fraud but it can be evidence on fraud.

GIVING FALSE EVIDENCE AND CRIMINAL ACTION - CRIMINAL CONTEMPT PROCEEDINGS ARE QUASI CRIMINAL IN NATURE AND ANY ACTION ON THE PART OF A PARTY BY MISTAKE, INADVERTENCE OR BY MISUNDERSTANDING DOES NOT AMOUNT TO CONTEMPT

R.S. Sujatha vs State Of Karnataka & Ors. Decided by Supreme Court on 29 November, 2010 Bench: Justice P Sathasivam, Justice B Chauhan The Tribunal failed to appreciate that criminal contempt proceedings are quasi criminal in nature and any action on the part of a party by mistake, inadvertence or by misunderstanding does not amount to contempt. In contempt proceedings, the court is the accuser as well as judge of the accusation. Therefore, it behoves the Tribunal to act with great circumspection as far as possible, making all allowances for errors of judgment. Any action taken in unclear case is to make the law of contempt do duty for other measures and therefore is totally unwarranted and should not be encouraged. The proceedings being quasi criminal in nature, burden and standard of proof required is the same as required in criminal cases.The charges have to be framed as per the statutory rules framed for the purpose and proved beyond reasonable doubt keeping in mind that the alleged contemnor is entitled to the benefit of doubt. Law does not permit imposing any punishment in contempt proceedings on mere probabilities. The court cannot

punish the alleged contemnor without any foundation merely on conjectures and surmises. Thus, from the above, it is evident that the inquiry/contempt proceedings should be initiated by the court in exceptional circumstances where the court is of the opinion that perjury has been committed by a party deliberately to have some beneficial order from the court. There must be grounds of a nature higher than mere surmise or suspicion for initiating such proceedings. There must be distinct evidence of the commission of an offence by such a person as mere suspicion cannot bring home the charge of perjury. More so, the court has also to determine as on facts, whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed.

PROSECUTION SHOULD BE ORDERED WHEN IT IS CONSIDERED EXPEDIENT IN THE INTERESTS OF JUSTICE TO PUNISH THE DELINQUENT AND NOT MERELY BECAUSE THERE IS SOME INACCURACY IN THE STATEMENT WHICH MAY BE INNOCENT OR IMMATERIAL.

In **Chajoo Ram v. Radhey Shyam & Anr., AIR 1971 SC 1367**, Court while dealing with a similar issue held as under: ".....No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice

to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the Court should be satisfied that there is reasonable foundation for the charge....."

FALSITY CAN BE ALLEGED WHEN TRUTH STANDS OUT GLARINGLY AND TO THE KNOWLEDGE OF THE PERSON WHO IS MAKING THE FALSE STATEMENT

In **Chandrapal Singh & Ors. v. Maharaj Singh & Anr., AIR 1982 SC 1238**, Court while dealing with a case of a false statement for the purposes of Sections 193 and 199 IPC held as under: " When it is alleged that a false statement has been made in a declaration which is receivable as evidence in any Court of Justice or before any public servant or other person, the statement alleged to be false has to be set out and its alleged falsity with reference to the truth found in some document has to be referred to pointing out that the two situations cannot co-exist, both being attributable to the same person and, therefore, one to his knowledge must be false. Rival contentions set out in affidavits accepted or rejected by courts with reference to onus probandi do not furnish foundation for a charge under Section 199 IPC.Acceptance or rejection of evidence by itself is not a sufficient yardstick to dub the one rejected as false. Falsity can be alleged when truth stands out glaringly and to the knowledge of the person who is making the false statement. Day in and day out in courts averments made by one set of witnesses are accepted and the counter-averments are rejected. If in all such

cases complaints under Section 199 IPC are to be filed not only there will open up floodgates of litigation but it would unquestionably be an abuse of the process of the court...."

ONCE THE COURT DECIDES TO TAKE ACTION AGAINST FILING FORGED DOCUMENT, THEN THE COURT SHOULD MAKE A FINDING TO THE EFFECT THAT ON THE FACT SITUATION IT IS EXPEDIENT IN THE INTEREST OF JUSTICE THAT THE OFFENCE SHOULD FURTHER BE PROBED INTO

In **Pritish v. State of Maharashtra & Ors., AIR 2002 SC 236**, Court dealt with the provision of Section 340 of the Code of Criminal Procedure, 1973 extensively, in a case where admittedly forged document had been filed in a reference under Section 18 of the Land Acquisition Act, 1894 for getting a higher amount of compensation. The court observed as under :- "Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed.....But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into.....It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the

interest of justice to inquire into the offence which appears to have been committed."

**CALLING WITNESS AT ANY STAGE - 1999 AMENDMENT
DOES NOT TAKE AWAY THE COURT'S INHERENT POWER TO
CALL FOR ANY WITNESS AT ANY STAGE**

**SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS
UNION OF INDIA AIR 2005 SC 3353 BENCH:
Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN
CHATTERJEE**

The omission of Order XVIII Rule 2(4) by the 1999 amendment does not take away the Court's inherent power to call for any witness at any stage either suo moto or on the prayer of a party invoking the inherent powers of the Court.

**AFFIDAVIT IS NOT LEGAL EVIDENCE - WITHIN THE
MEANING OF SECTION 3 OF THE INDIAN EVIDENCE ACT**

**AYAAUBKHAN NOORKHAN PATHAN VS STATE OF
MAHARASHTRA & ORS. AIR 2013 SC 58**

It is a settled legal proposition that an affidavit is not evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'). Affidavits are therefore, not included within the purview of the definition of "evidence" as has been given in Section 3 of the Evidence Act, and the same can be used as "evidence" only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'). Thus, the filing of an

affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any Court or Tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation. (Vide: *Sudha Devi v. M.P. Narayanan & Ors.*, AIR 1988 SC 1381; and *Range Forest Officer v. S.T. Hadimani*, AIR 2002 SC 1147).

NO MATERIAL CAN BE RELIED UPON TO ESTABLISH A CONTESTED FACT WHICH ARE NOT SPOKEN TO BY THE PERSONS WHO ARE COMPETENT TO SPEAK ABOUT THEM AND ARE SUBJECT TO CROSS-EXAMINATION

M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen & Ors., AIR 1972 SC 330, considered the application of Order XIX, Rules 1 and 2 CPC, and observed as under:- "But the application of principles of natural justice does not imply that what is not evidence, can be acted upon. On the other hand, what it means is that no material can be relied upon to establish a contested fact which are not spoken to by the persons who are competent to speak about them and are subject to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal, the question that naturally arises is: is it a genuine document, what are its contents and are the statements contained therein true..... If a letter or other document is produced to establish some fact which is relevant to the inquiry, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this

fact. This is both in accordance with the principles of natural justice as also according to the procedure under O. 19 of the Code and the Evidence Act, both of which incorporate the general principles.”

In Needle Industries (India) Ltd. & Ors. v. N.I.N.I.H. Ltd. & Ors., AIR 1981 SC 1298, this Court considered a case under the Indian Companies Act, and observed that, “it is generally unsatisfactory to record a finding involving grave consequences with respect to a person, on the basis of affidavits and documents alone, without asking that person to submit to cross-examination”.

THE CONDUCT OF THE PARTIES MAY BE AN IMPORTANT FACTOR, WITH REGARD TO DETERMINING WHETHER THEY SHOWED THEIR WILLINGNESS TO GET THE SAID ISSUE DETERMINED ON THE BASIS OF AFFIDAVITS

AYAAUBKHAN NOORKHAN PATHAN VS STATE OF MAHARASHTRA & ORS. 2013 AIR 58 However, the conduct of the parties may be an important factor, with regard to determining whether they showed their willingness to get the said issue determined on the basis of affidavits, correspondence and other documents, on the basis of which proper and necessary inferences can safely and legitimately be drawn.

In Ramesh Kumar v. Kesho Ram, AIR 1992 SC 700, Court considered the scope of application of the provisions of O. XIX, Rr. 1 and 2 CPC in a Rent Control matter, observing as under:-
“The Court may also treat any affidavit filed in support of the

pleadings itself as one under the said provisions and call upon the opposite side to traverse it. The Court, if it finds that having regard to the nature of the allegations, it is necessary to record oral evidence tested by oral cross-examination, may have recourse to that procedure.”

IN A CASE WHERE THE DEPONENT IS AVAILABLE FOR CROSS-EXAMINATION, AND OPPORTUNITY IS GIVEN TO THE OTHER SIDE TO CROSS-EXAMINE HIM, THE SAME CAN BE RELIED UPON

AYAAUBKHAN NOORKHAN PATHAN VS STATE OF MAHARASHTRA & ORS. AIR 2013 SC 58 Therefore, affidavits in the light of the aforesaid discussion are not considered to be evidence, within the meaning of Section 3 of the Evidence Act. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such view, stands fully affirmed particularly, in view of the amended provisions of Order XVIII, Rules 4 & 5 CPC. In certain other circumstances, in order to avoid technicalities of procedure, the legislature, or a court/tribunal, can even lay down a procedure to meet the requirement of compliance with the principles of natural justice, and thus, the case will be examined in the light of those statutory rules etc. as framed by the aforementioned authorities.

RE-OPEN AND RECALL OF WITNESS - POWER UNDER ORDER 18 RULE 17 CPC IS TO BE SPARINGLY EXERCISED AND IN APPROPRIATE CASES AND NOT AS A GENERAL RULE

In *Vadiraj Naggappa Vernekar (dead) through LRs. vs. Sharadchandra Prabhakar Gogate*, (2009) 4 SCC 410, this Court had an occasion to consider similar claim, particularly, application filed under Order XVIII Rule 17 and held as under: “25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an

application. In the present appeal, no such case has been made out.”

PLAINTIFF CANNOT BE PERMITTED TO FILE SUCH APPLICATIONS TO FILL THE LACUNAE IN ITS PLEADINGS AND EVIDENCE

THE HONBLE JUSTICE P. SATHASIVAM & THE HONBLE JUSTICE JAGDISH SINGH KHEHAR of Supreme Court of India in the case of M/S Bagai Construction vs M/S Gupta Building Material Store Decided on 22 February, 2013 in CIVIL APPEAL NO. 1787 OF 2013 it is held that The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial Court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him.

AFTER VARIOUS AMENDMENT IN THE CPC, IT IS DESIRABLE THAT THE RECORDING OF EVIDENCE SHOULD BE CONTINUOUS AND FOLLOWED BY ARGUMENTS 2013 SC

THE HONBLE JUSTICE P. SATHASIVAM & THE HONBLE JUSTICE JAGDISH SINGH KHEHAR of Supreme Court of India in the case of M/S Bagai Construction vs M/S Gupta Building Material Store Decided on 22 February, 2013 in CIVIL APPEAL NO. 1787 OF 2013 it is held that After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered.

PLAINTIFF HAS FILED APPLICATIONS AFTER MORE THAN SUFFICIENT OPPORTUNITY HAD BEEN GRANTED TO HIM TO PROVE HIS CASE – NOT TENABLE

THE HONBLE JUSTICE P. SATHASIVAM & THE HONBLE JUSTICE JAGDISH SINGH KHEHAR of Supreme Court of India in the case of M/S Bagai Construction vs M/S Gupta Building Material Store Decided on 22 February, 2013 in CIVIL APPEAL NO. 1787 OF 2013 it is held that In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed

those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.

WHEN A JOINT TRIAL CAN BE ORDERED BY THE COURT - IF ONE ACTION CAN BE ORDERED TO STAND AS A COUNTERCLAIM IN THE CONSOLIDATED ACTION, A JOINT TRIAL CAN BE ORDERED

In *State Bank of India v. Ranjan Chemicals Ltd.*, (2007) 1 SCC 97, the Supreme Court indicated the circumstances wherein a joint trial could be ordered :- A joint trial can be ordered by the court if it appears to it that some common question of law or fact arises in both proceedings or that the right to relief claimed in them are in respect of or arise out of the same transaction or series of transactions or that for some other reason it is desirable to make an order for joint trial. Where the plaintiff in one action is the same person as the defendant in another action, if one action can be ordered to stand as a counterclaim in the consolidated action, a joint trial can be ordered. An order for joint trial is considered to be useful in that, it will save the expenses of two attendances by the counsel and witnesses and the trial Judge will be enabled to try the two actions at the same time and take common evidence in respect of both the claims. If therefore the claim made

by the Company can be tried as a counterclaim by the Debt Recovery Tribunal, the court can order joint trial on the basis of the above considerations. It does not appear to be necessary that all the questions or issues that arise should be common to both actions before a joint trial can be ordered. It will be sufficient if some of the issues are common and some of the evidence to be let in is also common, especially when the two actions arise out of the same transaction or series of transactions. A joint trial is ordered when a court finds that the ordering of such a trial, would avoid separate overlapping evidence being taken in the two causes put in suit and it will be more convenient to try them together in the interests of the parties and in the interests of an effective trial of the causes. This power inheres in the court as an inherent power.

LAW AND PROCEDURE IN DEFICIT STAMP DUTY AND IMPOUNDING OF DOCUMENTS EXPLAINED

JUSTICE S. Abdul Nazeer in the case of **Sri J. Prakash vs Smt. M.T. Kamalamma And Anr. Reported in AIR 2008 Kant 26, ILR 2007 KAR 4752, 2008 (2) KarLJ 202** has clarified the law on the subject of Stamp Duty and Duty penalty and procedure:- “Section 33 of the Act deals with examination and impounding of instruments. It states that every person having by law or consent of parties authority to receive evidence, and every person incharge of a public office, except an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly

stamped, impound the same. To impound means, to keep in the custody of the law. Section 34 of the Act deals with a different situation. It states that instruments not duly stamped are inadmissible in evidence. However, such document may be admitted in evidence on payment of duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of rupees five, or, when ten times the amount of proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion. Section 37 of the Act lays down the procedure to deal with the instruments impounded under Section 33, or the instruments admitted in evidence upon payment of duty and penalty under Section 34; or the documents dealt with under Section 36 of the Act. In respect of the documents admitted in evidence upon payment of duty and penalty as provided under Section 34, Section 37 mandates the authority who receives the instrument in evidence and admits such instrument in evidence, to send an authenticated copy of such instrument together with a certificate in writing stating the amount of duty and penalty levied in respect of the said document and send such amount to the Deputy Commissioner or to such person as he may appoint in this behalf. In so far as the impounded document under Section 33 is concerned, Sub-section (2) of Section 37 mandates that the person so impounding an instrument has to send it in original to the Deputy Commissioner.

Section 38 of the Act deals with the power to refund the penalty paid under Sub-section (1) of Section 37 of the Act. It states that

when a copy of an instrument is sent to the Deputy Commissioner under Sub-section (1) of Section 37, he may, if he thinks fit, refund any portion of the penalty in excess of five rupees which has been paid in respect of such instrument.

Section 39 of the Act deals with the power of the Deputy Commissioner to stamp instruments impounded under Section 33 of the Act. It states that when the Deputy Commissioner impounds any instrument under Section 33, or receives any instrument sent to him under Sub-section (2) of Section 37, not being an instrument chargeable with duty of not exceeding fifteen naye paise only or mortgage of crop chargeable under clause (a) or (b) of Section 3 with a duty of twenty-five paise, he shall adopt the following procedures:

(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement therein that it is duly stamped, or that it is not so chargeable, as the case may be;

(b) if he is of the opinion that such instrument is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or if he thinks fit; an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees.”

Chilakuri Gangulappa v. Revenue Divisional Officer, Madanapalli, AIR 2001 S.C. 1321 “Instruments impounded how dealt with.- (1) Where the person impounding an instrument

under section 33 has by law or consent of parties authority to receive evidence and admits, such instrument in evidence upon payment of a penalty as provided by section 35 or of duty as provided by section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf. (2) In every other case, the person so impounding an instrument shall send it in original to the Collector. It is clear from the first sub-section extracted above that the court has a power to admit the document in evidence if the party producing the same would pay the stamp duty together with a penalty amounting to ten times the deficiency of the stamp duty. When the court chooses to admit the document on compliance of such condition the court need forward only a copy of the document to the Collector, together with the amount collected from the party for taking adjudicatory steps. But if the party refuses to pay the amount aforesaid the Collector has no other option except to impound the document and forward the same to the Collector. On receipt of the document through either of the said avenues the Collector has to adjudicate on the question of the deficiency of the stamp duty. If the Collector is of the opinion that such instrument is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same together with a penalty of an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof. In the present case the trial court should

have asked the appellant, if it finds that the instrument is insufficiently stamped, as to whether he would remit the deficient portion of the stamp duty together with a penalty amounting to ten times the deficiency. If the appellant agrees to remit the said amount the court has to proceed with the trial after admitting the document in evidence. In the meanwhile, the court has to forward a copy of the document to the Collector for the purpose of adjudicating on the question of deficiency of the stamp duty as provided in Section 40(1)(b) of the Act. Only if the appellant is unwilling to remit the amount the court is to forward the original of the document itself to the Collector for the purpose of adjudicating on the question of deficiency of the stamp duty. The penalty of ten times indicated therein is the upper limit and the Collector shall take into account all factors concerned in deciding as to what should be the proper amount of penalty to be imposed.”

DOCUMENT INSUFFICIENTLY STAMPED CANNOT BE PERMITTED TO BE USED EVEN FOR COLLATERAL PURPOSE

JUSTICE B. Padmaraj, of Karnataka High Court, in the case of **Jayalakshmi Reddy vs Thippanna And Ors.** Reported in **ILR 2002 KAR 5163, 2003 (5) KarLJ 263** “.....Document, which is insufficiently stamped, cannot be permitted to be used for collateral purpose in view of Section 34 of the Karnataka Stamp Act which clearly prescribes that no instrument chargeable with duty shall be admitted in evidence for any purpose. The instrument in question is an agreement of sale dated 4-11-1995

between the parties viz., the vendor and vendee, whereunder the vendor agreed to sell his immovable property for a consideration of Rs. 15,000/- and received thereunder a sum of Rs. 14,500/- and where in part performance of the contract, possession of the immovable property is delivered. Thus, the instrument in question fully satisfies the conditions of Article 5(e)(i) and hence, the stamp duty payable on conveyance is to be demanded and paid in view of the said Article 5(e)(i). The instrument covered by Article 5(e)(i) is treated as a conveyance and the proper stamp duty payable thereon is the same as a conveyance (No. 20) on the market value of the property and the Explanation (II) only says that where subsequently, conveyance is executed, the stamp duty already paid or recovered on the agreement shall be adjusted and it does not in any way gives an option to the party to pay the stamp duty subsequently. On the other hand Article 5(e)(i) clearly indicates that the proper duty is to be paid at the stage of agreement itself if it satisfies the conditions thereof. Having considered the agreement as a whole in the light of Article 5(e)(i) of the Karnataka Stamp Act, I am of the view that it can be regarded as a conveyance as the instrument in question is covered by Article 5(e)(i) for which the proper duty payable under the Karnataka Stamp Act is the same duty as a conveyance (No. 20) on the market value of the property. In the instant case, the proper stamp duty payable under the Karnataka Stamp Act being not paid and when the document was sought to be used in evidence, the Court below was justified in passing the impugned order which cannot be found fault with. Hence, it needs no interference.”

DOCUMENT WHICH IS REGISTRABLE AND NOT TRANSACTION

Deb Dutt Seal v. Raman Lal, AIR 1970 SC 659 wherein the Hon'ble Supreme Court has held that it is on the construction of the document wherein it requires registration or not. The Hon'ble Supreme Court observed that in order to require registration, document must contain all the essentials of transaction and one essential is that the title deeds contain all essential of transaction. According to the Hon'ble Supreme Court it is a document which is registrable under the Registration Act and not a transaction.

Government of Uttar Pradesh v. Mohammad Amir Ahmad Khan AIR 1961 SC 787. That was a case where the question arose whether the Collector had any power to impound an instrument sent to him for adjudication under Section 31 of the Stamp Act. The Supreme Court held that under that section, the Collector had no such power, as under Section 31 of the Stamp Act, the Collector could only give his opinion as regards the duty, with which, in his judgment, the instrument was chargeable and once that duty was performed by the Collector, he would become functus officio.

GPA EXECUTED BEFORE NOTARY IS IN-VALID FOR EXECUTING SALE DEED – GPA EXECUTED AND

**AUTHENTICATED BEFORE REGISTRAR OR SUB-REGISTRAR
IS ONLY VALID**

That Section 32 of the Registration act makes it imperative that every document to be registered shall be presented at the proper registration office by some person executing or claiming under the same or by the representative or assign of such person, agent, representative or assign duly authorised by power-of-attorney executed and authenticated in the manner provided by Section 33. In case a document is presented for registration by a person other than a party to it or his legal representative or assign or by a person who is not an agent authorised in the manner prescribed under Section 33 such presentation is wholly imperative and presentation of such a document is void. That the object of Sections 32 to 35 Is to avoid commission of frauds by means of registration under the Act by a person not duly authorised and it is the duty of the Court In India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to be presented. A Registrar has no jurisdiction to register a document unless he is moved to do so by a person who has executed it, or claims under it. or by the representative of such a person. That the object of the Legislature in enacting Section 32 is to prevent a mere outsider from presenting for registration a document with which he has no concern, and in which he has no interest. To allow all and sundry to present documents for registration would be to open a door to fraud and forgery and the

Legislature, therefore. Intended to provide that the registration should be initiated by the document being presented for registration by a person "having a direct relation to the deed". If the presentation for registration was ab initio defective, in that it did not conform to the requirements of the provisions of the Indian Registration Act in that regard, then, such initial defect in presentation for registration affected the jurisdiction of the registering officer' to effect the registration of the document.

Further technical objection may be taken to such power of attorney. The Section 28 of the Registration Act, as is relevant in the context, provides that a document affecting immovable property shall be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.

Case laws on the point

Justice Pratibha Bonnerjea, of Calcutta High Court in the case of **Goswami Malti Vahuji Maharaj vs Purushottam Lal Poddar AIR 1984 Cal 297** Quotes following case laws:- In AIR 1928 Pat 304 (Elizabeth" May Toomey v. Bhupendra Nath Bose) a document was executed and registered under Sections 32 and 33 of the Registration Act on the strength of a Power of attorney which was challenged as invalid inter alia on the ground that in the Registrar's certificate on the document, the concerned power-of-attorney was described as a general power of attorney. It was contended that it did not authorise the agent Mr. Kennedy to admit execution or to present the same for registration. It was held at page 313:-- "The document purports to have been

properly registered in accordance with the provisions of Sections 32 and 33, Registration Act. It was the duty of the Sub-Registrar to satisfy himself that the power-of-attorney gave Mr. Kennedy the necessary authority and it must be assumed until contrary is proved that he so satisfied himself before he admitted the document for registration and signed the endorsement. I am certainly not prepared to find merely because the power-of-attorney is described as a general power in the Sub-Registrar's endorsement that it did not authorise Mr. Kennedy to admit execution or present the document for registration."

Justice Prabir Kumar Samanta, of **Calcutta High Court in the case of Dulal Ranjan Ghosh Dastidar vs Rajani Tandon And Anr. 2004 (1) CHN 517 held** "Section 32 of the said Act primarily stipulates that every document to be registered shall be presented at the proper Registration Office by some person executing the same. Section 33(1)(a) of the said Act provides that for the purpose of Section 32 i.e., for the purpose of presentation of a document for registration, only such Power of Attorney shall be recognised for such presentation which has been executed by the principal before and authenticated by the Registrar or Sub-Registrar within whose District or Sub-District the principal resides. Thus upon conjoint reading of Section 32 and Section 33(1)(a) of the said Act it appears that while Section 32 empowers the executants of a document to present the same for registration without any reservation, but requires the Power of Attorney to be executed before and authenticated by the Registrar or Sub-Registrar within whose District or Sub-District the principal

resides for valid presentation for registration by the constituted attorney on behalf of the principal. These two clauses read together make it clear that the agent, representative or assignee of the principal whether authorised or not to execute the document on behalf of the principal will be entitled to validly present the documents for registration only when such agent, representative or assignee has been duly authorised by Power of Attorney executed and authenticated in the manner provided under Section 33(1)(a). If that position is accepted, and it has to be accepted as such in view of the provisions contained therein, can it be said that only for the purpose of presentation of document for registration which has been executed by the principal himself such requirements would be necessary but for the purpose of execution of the document on behalf of the principal such requirements would not be necessary? Such interpretation would make the said provisions otiose, because by a Power of Attorney which is neither executed nor authenticated in the manner as provided under Section 33(1)(a) of said Act, an agent, representative or assignee of the principal who will not be entitled to validly present a document for registration would then be entitled not only to present for registration but also to execute the same on behalf of the principal. In other words each Clauses of Section 32 has its independent application and meaning and one has not the effect of substituted application over the other. Therefore, Section 32 read as a whole along with Section 33(1)(a) of the said Act would imply that whenever by a Power of Attorney a principal authorises his agent, representative or assignee to execute a document on his behalf, such Power of Attorney would

be required to be authenticated in the manner provided under Section 33(1)(a) of the said Act.”

The following privy council case laws are quoted on the point By Justice Ratnam of Madras High Court Judgement in the case of **Sekar Mudaliar And Etc vs Shajathi Bi And Anr. Reported in AIR 1987 Mad 239,**

Mujibunnissa v. Abdul Rahim (1901) I.L.R. 23 A11. 233 (P.C.) : 288415 the Privy Council pointed out that the principle in that decision would apply to that case as well and that the principle is that a Registrar or a Sub Registrar has no jurisdiction to register a document, unless he is moved to do so by a person who has executed or claims under it or by the representative or assign duly authorised by a power of attorney executed and authenticated in manner prescribed in Section 33 of that Act. It was also further pointed out that the executants of a deed attending the Registrar or a Sub Registrar merely for the purpose of admitting the execution, cannot be treated for the purposes of Section 32 of Act III of 1877, as presenting the deed for registration and their assent to the registration will not be sufficient to give the Registrar jurisdiction. The object of Sections 32, 33, 34 and 35 of Act III of 1877 was pointed out to be to make it difficult for persons to commit frauds by means of registration under the Act. The Privy Council further pointed out the duty of the courts in this connection and stated that Courts ought not to allow the imperative provisions of the Act to be defeated when as in that case, it was proved that an agent who

presented a document for registration had not been duly authorised in a manner prescribed by the Act to present it.

In Dottie Karan v. Lachmi Prasad A.I.R. 1931 P.C. 52 : 33 L.W. 566 : 589 A 58 : 60 M.L.J. 441, the validity for presentation of a document for regulation by a power of attorney agent, the power in whose favour contained an alteration in the date, came to be considered. The Privy Council pointed out that the date in the power of attorney was altered and the registration of the mortgage was not effected in accordance with the provisions of the Registration Act and that the deed was not properly registered, not being presented for registration by an authorised agent. It was also further laid down that such a defect was not one merely of procedure, but one of jurisdiction in the registering officer.

In a Single Bench decision of the Andhra Pradesh High Court reported in AIR 1958 Andh Pra 107, *D. Sardar Singh v. Pissumal H. Bankers*, it was held that where a person holding a power-of-attorney executes a sale-deed he cannot present it for registration unless he holds a power-or-attorney satisfying the requirements of Section 33.

In AIR 1927 Bom 487 (FB), Sitaram v. Dharma-sukhram, held that a person executing a document on behalf of himself and another under a power-of-attorney from the latter, which power does not comply with Section 33 or the Indian Registration Act is

competent to appear before the Registrar to admit the execution of that document.

NOTARISED GPA WHERE ITS IS ACCEPTED

Jugraj Singh & Anr vs Jaswant Singh & Ors 1971 AIR 761, 1971 SCR (1) 38 The first power of attorney was not authenticated as required by s; 33 of the Indian Registration Act which in the case of an Indian residing abroad, requires that the document should be authenticated by a Notary Public. The document only bore the signature of a witness without anything to show that he was a Notary Public. In any event there was no authentication by the Notary Public (if he was one) in the manner which the law would consider adequate. The second power of attorney however did show that it was executed before a proper Notary Public who complied with the laws of California and authenticated the document as required by that law, and was also duly authenticated in accordance with our laws. The only complaint was that the Notary Public did not say in his endorsement that V had been identified to his satisfaction. But that flows from the fact that he endorsed on the document that it had been subscribed and sworn before him. There is a presumption of regularity of official acts and he must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. This made the second power of attorney valid and effective both under s. 85 of the Indian Evidence Act and s. 33 of the Indian Registration Act.

BHATORI VS RAM PIARI 1996 AIR 2754 = 1996 (4) Suppl. SCR 180 = 1996 (11) SCC 655 = 1996 (7) JT 210 = 1996 (5) SCALE 752 POWER OF ATTORNEY HOLDER ALIENATING THE LANDS IN THE NAME OF HIS WIFE DEFRAUDING THE LAND OWNER – FRAUD UNRAVELS EVERYTHING 1996 SC

THE REGISTERED DOCUMENT WILL OPERATE, NOT FROM THE DATE OF ACTUAL REGISTRATION, BUT FROM THE DATE WHEN THE DEED WAS EXECUTED

JUSTICE R Raveendran, JUSTICE K Manjunath in the case of Veerabhadrapa And Anr. vs Jagadishgouda ILR 2003 KAR 3042, 2002 (5) KarLJ 55 It is well-settled that when a document is duly presented for registration (within the time prescribed), if its registration is refused or if its registration is kept pending, and thereafter the document is registered either on the direction of the Registrar or competent Court or on the Sub-Registrar satisfying himself that there is no impediment for registration, the registered document will operate, not from the date of actual registration, but from the date when the deed was executed. This principle can be gathered from the provisions of the Registration Act, 1908 (Sections 47 and 75) and several decisions the earliest of which are that of the Madras High Court in the case of Venkatarama Reddi v. Pillati Rama Reddy, ILR 1916(40) Mad. 204 and of the Privy Council in the case of Chhotey Lal v. Collector of Moradabad, AIR 1922 PC 279 : ILR 1922(44) All. 514. A learned Single Judge of this Court in the case of Azeezulla Sheriff alias Anwar Pasha and Ors. v. Bhab-huthimul, 1972(2)

Mys. L.J. 408 : AIR 1973 Mys. 276, held thus: "Sub-section (3) of Section 75, only determines the deemed date of registration in respect of documents compulsorily registered in pursuance of an order made under Section 75(1). Sub-section (3) of Section 75 does not deal with the effect of registration of a document. That topic is dealt with by Section 47 which states that once a document is registered, it shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its -registration. The expression "not from the time of its registration" used in Section 47 makes it clear that the date of registration, whether actual or the deemed date under Section 75(3), has no relevance whatsoever for determining the time from which the registered document operates. Once the document is registered, whether it is on admission of execution under Section 35 or by way of compulsory registration under Part XII of the Act, the provisions of Section 47 are attracted for the purpose of determining the time from which the registered document operates". This was reiterated in the case of Rathnakar v. H.S. Madhava Rao and Ors., 1990(4) Kar. L.J. 541 : ILR 1991 Kar. 2190

JUSTICE R Raveendran, JUSTICE K Manjunath in the case of Veerabhadrappe And Anr. vs Jagadishgouda ILR 2003 KAR 3042, 2002 (5) KarLJ 55 When registration of a document is ordered to be kept pending, or when registration of a document is refused, and subsequently such document is ordered to be registered, such registration takes effect as if the document had been registered when it was first duly presented for registration.

That would mean that the registration relates back to the date of execution. The well-settled principle is that if there is a competition between registered documents relating to the same property, the document first in order of time has priority over the other, though the former document may not have been registered until after the latter.

JUSTICE R Raveendran, JUSTICE K Manjunath in the case of Veerabhadrappe And Anr. vs Jagadishgouda ILR 2003 KAR 3042, 2002 (5) KarLJ 55 The role played by the Sub-Registrar in registering a document is rather limited. He has no power or authority to examine the rival claims as to whether a sale deed presented for registration is really a sale deed or not, nor is he empowered to grant any declarations in regard to binding nature of documents.

NO DIRECTION CAN BE ISSUED TO THE SUB-REGISTRAR NOT TO REGISTER THE DOCUMENT

Justice B Singh, Justice J Shety In S. Sreenivasa Rao v. The Sub-Registrar (Headquarters), Mysore, **ILR 1990 KAR 3740, 1990 (2) KarLJ 258** Court held that if the provisions of the Registration Act and Rules and other laws are complied with, the Sub-Registrar is bound to register the document and no direction can be issued to the Sub-Registrar not to register the document. It was also held that if any person is interested in contending that the registered document is invalid or illegal for any reason,

he has to question the validity before the proper forum in appropriate proceedings. We also find no provision in the Registration Act, 1908 which obliges the Sub-Registrar to act upon any such direction and/or to investigate at the stage of registration of a document itself, the title of the party executing the document. We are, therefore of the view that if a document is presented for registration by the executant, and in doing so, the executant complies with all the provisions of Registration Act, 1908, it is not open to the Sub-Registrar to refuse registration of the document unless he exercises that discretion pursuant to any provision in the Registration Act, 1908 or any other law or Rule having the force of law. The mere registration of a document is by itself not a proof of its validity, neither does it follow that the executant had title to the property, he seeks to dispose of under the document. Matters such as relating to title have to be decided before the appropriate forum. If any person is interested in contending that any particular document executed and registered under the Registration Act, 1908 is invalid or illegal for any reason whatsoever, he is certainly at liberty to question the validity of the document, the title of the executant, and such other questions before the proper forum in an appropriate proceeding.”

Rule 145 of the Karnataka Registration Rules, provides thus: "Protests against registration of documents.--The Registering Officer should not entertain any petition protesting against registration of document. Such petitions, when insisted should be received and returned immediately with an appropriate

endorsement and no record should be kept in the office. Since these petitions are not to be filed, their copies cannot be granted".

SUB-REGISTRAR CANNOT GO INTO QUESTION OF TITLE AND GENUINENESS OF DOCUMENTS

Justice V G Gowda in the case of Sulochanamma vs H. Nanjundaswamy 2001 (1) KarLJ 215 The Sub-Registrar was entrusted with the duty of registering the documents in accordance with the provisions of the Act and he was not authorised to go into the genuineness or otherwise of the documents presented before him. If the documents are bogus or false, the party affected by it will have the right to initiate both civil and criminal proceedings to prosecute the party who tries to have benefit from such document and also to safeguard his right, title and interest. It was not for either the Tahsildar or the Sub-Registrar to express opinion as to the genuineness or otherwise of the documents unless called upon by the Court of law or any other authorised investigating agency. There was no occasion for the Sub-Registrar to refer the document to the Tahsildar when presented for the purpose of registration. Thus, both the Tahsildar and the Sub-Registrar have exceeded their jurisdiction in the matter in submitting his report regarding registration of the document and upon such report the second respondent should not have made an endorsement on the document and refused to register the document by him.

PRESUMPTION OF REGISTERED DOCUMENT

Prem Singh vs. Birbal (2006) 5 SCC 353 the Apex Court has held that there is a presumption that a register document is validly executed. A registered document, therefore, prima facie could be valid in law. The onus of proof thus would be on a person who leads evidence to rebut the presumption.

NOTARIES ARE ABSOLUTELY MISUSING THE LICENCE GRANTED TO THEM

In (Dy. General Manager, Re-designated As Dy. Director, Isb Etc., v. Sudarshan Kumari and Ors., .), **1996 AIR 1894, 1996 SCC (3) 763** the Supreme Court has noticed Section 8 of the Notaries Act. After noticing, the Supreme Court has ruled as under: "We have seen original rejoinder affidavit filed in this Court. They have approached one Notary who had initially attested it and later he had cancelled it without even verifying- the valid ground on which the earlier attestation came to be cancelled, same was again attestation came to be cancelled, same was again attested by one Sundersham Kumar on November 1, 1994. In view of the admitted position that she herself had not signed and asked someone who had signed it, it would be obvious that the person who had signed before him was not the respondent nor even the person was known to the Notary. None identified her before the Notary, yet he attested the affidavit. This would show that some Notaries are absolutely misusing the licence granted to them

without any proper verification of the persons who has signed the document and are attesting false affidavits of impersonators."

KNOW MORE ABOUT NOTARY BEFORE SEEKING/DOING HIS WORK

In *Prataprai Trumbaklal Mehta v. Jayant Nemchand Shah and Anr.*, , **AIR 1992 Bom 149**, the Bombay High Court has considered once again Section 8 of the Notaries Act, This is what the Bombay High Court says: "A notary has to make entry in the notarial register in respect of the notarial act of certifying copy of document as true copy of the original. Even if one or two columns of the said form is not applicable, entries must be made in the said register filling up remaining columns as are applicable and adapting the format accordingly. He has to place his signature and seal on the copy of the document and keep the copy on his record. It is the responsibility of a notary to satisfy himself that the original document intended to be executed before him was executed by the person concerned and not by someone else in the name of a different person i.e, about the identity of the executant of the original document by making all reasonable inquiries including insistence of identification of a member of the public by a legal practitioner known to the notary. Unless the executant is known to the notary personally, the notary must insist on written identification of the executant by an advocate and take signatures of both of them in token thereof in the notarial register in order to minimise the possibility of cheating by personification. Negligence of a notary in the discharge of his notarial functions

may jeopardise the interest of third parties and public interest itself. Notaries enjoy high status throughout the country and the Courts take judicial notice of the seal of the notary and presume that the document in question must have been certified as true copy after taking of all possible care by the notary in comparing the copy with its original and due verification of the identity of the executant and the person appearing before the notary for the certification."

On 9th August 1952, the President of India granted assent to the Notaries Act, 1952 passed by our Parliament. The said Act came into force on 14th December 1956 on issue of necessary notification and publication thereof in the Government Gazette. Prior to the passing of the said Act, the Government of India was empowered to appoint Notary-Public under Sections 138 and 139 of the Negotiable Instruments Act for the limited purpose of functioning of Notaries under the said Act. Prior to the passing of the said Act, the Master of Faculties in England also used to appoint Notaries Public in India for performing all notarial functions. Section 3 of the said Act empowers the Central Government to appoint any legal practitioner or any other person as a notary for the whole of India or part thereof. The said Section also empowers the State Government to appoint any legal practitioner or other person who possess prescribed qualifications as a notary for functioning as such within the State. The notarial functions include "certifying copies of documents" as true copies of the original. Section 15 of the Notaries Act, 1952 empowers the Central Government to make rules to carry out the purposes of the Act including prescribing of

fees payable to a notary for doing any notarial act and prescribing of form of registers required to be maintained by a notary, and particulars to be entered therein. In exercise of the powers conferred by Section 15 of the Notaries Act, 1952, the Central Government has framed the necessary rules. Rule 10(1) of the Notaries Rules, 1956 prescribes that every notary shall charge a fees for certifying copies of documents as true copies of the original at the rate prescribed therein. Rule 11(9) of the said Rules provides that every notary shall grant a receipt for the fees and charges realised by him and maintain a register showing all the fees and charges realised for every single notarial act. Rule 12 of the said Rules prescribes for use of seal of notary. Rule 11(2) of the said Rules in terms provides that every notary shall maintain notarial register in prescribed Form No. 15. The prescribed form of the register provides for entry of every notarial act in the notarial register and taking of signature of the person concerned in the register and entry in respect of fees charged. Even if one or two column of the said form is not applicable, entries must be made in the said register filling up remaining columns as are applicable and adapting the format accordingly. It is the responsibility of a notary to satisfy himself that the original document intended to be executed before him was executed by the person concerned and not by someone else in the name of a different person. It is the responsibility of the notary to satisfy himself about the identity of the execution of the original document by making all reasonable inquiries including insistence of identification of a member of the public by a legal practitioner known to the notary. Unless the executant is known to the notary

personally, the notary must insist on written identification of the executant by an advocate in order to minimise the possibility of cheating by personification. Negligence of a notary in the discharge of his notarial functions may jeopardise the interest of third parties and public interest itself. If the work of comparison of copy of the document with the original and the prima facie scrutiny of authenticating the original involves labour for too little a fee, the person concerned need not opt to become a notary. Notaries, formerly known as Notary-Public, enjoy high status throughout the country and the Courts take judicial notice of the seal of the notary and presume that the document in question must have been certified as true copy by the notary after taking of all possible care by the notary in comparing the copy with its original and due verification of the identity of the executant and the person appearing before the notary for the certification.

CERTIFIED COPY OF A DOCUMENT NEED NOT BE PROVED BY CALLING WITNESS

The document being a certified copy of a public document need not be proved by calling a witness (vide *Madamanchi Ramappa v. Muthaluru Bojjappa* AIR 1963 SC 1633).

SUIT FOR CANCELLATION OF INSTRUMENT BY A PERSON WHO DID NOT EXECUTE THE DOCUMENT WOULD NOT LIE

A Full Bench of Madras High Court in *Muppudathi v. Krishnaswami* AIR 1960 Madras 1 (F.B.) when the

instrument/document is not executed by the plaintiff, the same does not create a cloud upon the title of the true owner nor does it create apprehension that it may be a source of danger. Accordingly, a suit for cancellation of instrument by a person who did not execute the document would not lie. However, there could be cases where instruments are executed or purported to be executed by a party or by any person who can bind him in certain circumstances. As pointed out by the Madras High Court, these are : a party executing the document or principal in respect of a document executed by his agent, or a minor in respect of document executed by his guardian de jure or de facto, the reversioner in respect of a document executed by the holder of the anterior limited estate, a real owner in respect of a document executed by a benamidar. In these cases, though the party may not have executed document, if those are allowed to stand, it may become a potential source of mischief and danger to the title and a suit would, therefore, be maintainable for cancellation of such document. When the document itself is not executed by the plaintiff, there is no necessity to have the document cancelled by a Court decree, for it has no effect on the title of true owner.

EFFECT OF REGISTRATION OF DOCUMENT

Honourable Apex Court in SURAJ LAMP & INDUSTRIES (P) LTD. vs. STATE OF HARAYANA [(2009) 7 SCC 363]. The following passage is apposite: "18.Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds

in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person(s) presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

SETTLEMENT DEED

A.Sreenivasa Pai and another v. Saraswathi Ammal alias G. Kamala Bai, AIR 1965 SC 1359 in which the Supreme Court considered the document to be a settlement deed and held that the death of the ultimate beneficiary during the life time of the life estate holder will not have the effect of defeating the right which had already vested on the beneficiary.

FRAUDULENT MISREPRESENTATION AS TO THE CHARACTER OF THE DOCUMENT

Smt. Dularia Devi vs Janardan Singh & Ors 1990 AIR 1173, 1990 SCR (1) 799 In the instant case, the plaintiff-appellant was totally ignorant of the mischief played upon her. She honestly believed that the instrument which she executed and got registered was a gift deed in favour of her daughter. She believed that the thumb impressions taken from her were in respect of that single document. She did not know that she had executed two documents, one of which alone was the gift deed, but the other was a sale of the property in favour of the defendants. This was, therefore, a case of fraudulent misrepresentation as to the character of the document executed by her and not merely as to its contents or as to its legal effect. The plaintiff-appellant never intended to sign what she did sign. She never intended to enter into the contract to which she unknowingly became a party. Her mind did not accompany her thumb impressions. It was thus a totally void transaction.

In *Ningawwa v. Byrappa*, **1968 AIR 956, 1968 SCR (2) 797**, Court referred to the well established principle that a contract or other transaction induced or tendered by fraud is not void, but only voidable at the option of the party defrauded. The transaction remains valid until it was avoided. This Court then said: (SCR p.801) "The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear

distinction between fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable. In *Foster v. Mackinon*, the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. In holding that such a plea was admissible, the court observed: It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the sign did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended... The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the 'actual contents' of the instrument."

REQUIREMENT OF ONE ATTESTING WITNESS TO PROVE A DOCUMENT

Rosammal Issetheenammal Fernandez (dead) by Lrs and others v. Joosa Mariyan Fernandez and others) AIR 2000 Supreme Court 2857 wherein the Apex Court has held '9. ... The main Part of Section 68 of the Indian Evidence Act puts on obligation on the party tendering any document that unless at least one attesting witness has been called for proving such execution the same shall not be used in evidence'.

ONCE DOCUMENT IS ADMITTED SUCH ORDER IS FINAL

Hon'ble Supreme Court in AIR 1961 SC 1655 (Javer Chand v. Pukhraj Surana) that; "Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, S.36 comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction."

DUTY OF COURT TO EXAMINE PROBATIVE VALUE OF EVERY DOCUMENT

Apex Court in H.Siddiqui v. A. Ramalingam (2011 (4) SC 240) "Admissibility of a document is one thing and its probative value quite another these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil Therefore, it is the duty of the Court to examine whether documents produced in the Court or contents thereof have any probative value.

In *State of Bihar and Ors. v. Sri Radha Krishna Singh & Ors.*, AIR 1983 SC 684, held as under: “Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil.”Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has “a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight. The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.”

In *Madan Mohan Singh & Ors. v. Rajni Kant & Anr.*, AIR 2010 SC 2933, Court examined a case as a court of fifth instance. The statutory authorities and the High Court has determined the issues taking into consideration a large number of documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. This Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity. This Court examined the probative value of the contents of the said documents and came to the conclusion that Smt. Shakuntala, second wife of the father of the contesting

parties therein had given birth to the first child two years prior to her own birth. The second child was born when she was 6 years of age; the third child was born at the age of 8 years; the fourth child was born at the age of 10 years; and she gave birth to the fifth child when she was 12 years of age. Therefore, it is the duty of the court to examine whether documents produced in the Court or contents thereof have any probative value.

PRESUMPTIVE AND PROBATIVE VALUE OF ENTRIES MADE IN OFFICIAL RECORD

(2010) 9 SCC 209 [Madan Mohan Singh and others vs. Rajni Kant and another “Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may

require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases. Such entries may be in any public document, i.e. school register, voter list or family register prepared under the Rules and Regulations etc. in force, and may be admissible under Section 35 of the Evidence Act as held in Mohd. Ikram Hussain Vs. The State of U.P. & Ors. AIR 1964 SC 1625; and Santenu Mitra Vs. State of West Bengal AIR 1999 SC 1587. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases. For determining the age of a person, the best evidence is of his/her parents, if it is supported by un-impeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the un-impeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. (Vide: Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors. AIR 1965 SC 282; Birad

Mal Singhvi Vs. Anand Purohit AIR 1988 SC 1796; Vishnu Vs. State of Maharashtra (2006) 1 SCC 283; and Satpal Singh Vs. State of Haryana JT 2010 (7) SC 500). If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein. (Vide: Updesh Kumar & Ors. Vs. Prithvi Singh & Ors., (2001) 2 SCC 524; and State of Punjab Vs. Mohinder Singh, AIR 2005 SC 1868). In S. Khushboo Vs. Kanniammal & Anr. (2010) 5 SCC 600, this Court, placing reliance upon its earlier decision in Lata Singh Vs. State of U.P. & Anr. AIR 2006 SC 2522, held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex. In S.P.S. Balasubramanyam Vs. Suruttayan @ Andali Padayachi & Ors. AIR 1992 SC 756, this Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act, that they live as husband and wife and the children born to them will not be illegitimate. The courts have consistently held that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years. However, such presumption can be rebutted by leading unimpeachable evidence. (Vide: Mohabbat Ali Khan Vs. Mohd. Ibrahim Khan, AIR 1929 PC 135; Gokalchand Vs.. Parvin Kumar, AIR 1952 SC 231; S.P.S. Balasubramanyam Vs. Suruttayan, (1994) 1 SCC 460; Ranganath Parmeshwar

Panditrao Mali Vs. Eknath Gajanan Kulkarni, (1996) 7 SCC 681; and Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy & Ors., (2005) 2 SCC 244).

DOCUMENT AND ITS LEGAL CONSTRUCTION

Supreme Court in the case of Subbegowda (Dead) by Lr. v. Thimmegowda (Dead) by Lrs., **JT 2004 (5) SC 274**, has held that the question of considering construction of a document is to be decided by finding out the intention of the executant, firstly from a comprehensive reading of the terms of the document itself, and the other circumstances on the basis of which the document is executed. It has been held by the Supreme Court that when the intention is clear then the construction of the document has to be done in such a manner that the intention of the parties are given effect to. If the document in hand is considered in the light of the aforesaid, it has to be held that it is a conveyance transferring right of the property and possession to the petitioner.

Mushir Mohammed Khan v. Sajida Bano **AIR 2000 SC 1085** was not the case related to one composite document. It was a case of three documents viz. Sale Deed, Agreement of reconveyance and Rent Note.

In Tamboli Raman Lal Moti Lal v. Ghanchi Chiman Lal Keshavlal **AIR 1992 SC 1236**, there was no relationship of debtor and creditor between the parties as is existed in the instant case.

Supreme Court has in Ram Gopal v. Nand Lal, AIR 1951 SC 139 stated the fundamental rule which should govern the courts while ascertaining the intention of the parties as thus (at p, 141, Para 7): "In construing a document, whether in English or in vernacular, the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered but that is only for the purpose of finding out the intended meaning of the words which have actually been employed".

INTERPRETATION OF DOCUMENT - WHERE AN ABSOLUTE TITLE IS GIVEN IN CLEAR AND UNAMBIGUOUS TERMS AND THE LATER PROVISIONS TRENCH ON THE SAME, THAT THE LATER-PROVISIONS HAVE TO BE HELD TO BE VOID

Decision reported in A.I.R 1963 S.C 890 1. Ramakishorelal and Anr. v. Kamalnarayan, which was followed in . The principle settled therein reads thus: "The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words in their ordinary, natural sense. To ascertain his intention, a Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyancer a

clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is clear conflict between what is stated in one part of the document and in another. In cases of such a conflict the earlier disposition of absolute title should prevail and the later direction of disposition should be disregarded as unsuccessful attempt to restrict the title already given. It is clear, however that an attempt should always be made to read the two parts of the document harmoniously, if possible; it is only when this is not possible e.g. where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later-provisions have to be held to be void."

RELEASE DEED RELEASES RIGHTS WHICH WERE CONTEMPLATED IN THE DEED

In CHINNATHAYI v. KULASEKHARA PANDIYA NAICKER AND ORS. 1952 AIR 29, 1952 SCR 241 , the Supreme Court has stated the principle "It is well settled that general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed."

SUIT FOR CANCELLATION OF DOCUMENT

Prem Singh and Others vs. Birbal and Others, (2006) 5 SCC 353. In this case, while writing the Judgment on behalf of the Division Bench, His Lordship the Hon'ble Mr.JUSTICE S.B.SINHA at Paragraph Nos.14 to 16 has held as under: 14. A suit for cancellation of instrument is based on the provisions of Section 31 of the Specific Relief Act, which reads as under: "31. When cancellation may be ordered.-(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.".....15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable documents. It provides for a discretionary relief. 16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity."

REGISTRAR OF DEEDS IS NOT AN ATTESTING WITNESS 2004 SC

Bhagat Ram And Anr. vs Suresh And Ors. AIR 2004 SC 436, The Registrar of Deeds who had registered a document in discharge of his statutory duty, does not become an attesting witness to the deed solely on account of his having discharged the statutory duties relating to the registration of a document. Registration of any will, and the endorsements made by the Registrar of Deeds in discharge of his statutory duties do not elevate him to the status of a 'statutory attesting witness'. However, a registrar can be treated as having attested to a will if his signature or mark appears on the document akin to the one placed by an attesting witness and he has seen the testator sign or affix his mark to the will or codicil or has received from the testator a personal acknowledgement of his signature or mark and he has also signed in the presence of the testator. In other words, to be an attesting witness, the registrar should have attested the signature of the testator in the manner contemplated by Clause (c) of Section 63 of the Succession Act. No particular form of attestation is provided. It will all depend on the facts and circumstances of a case by reference to which it will have to be answered if the registrar of deeds fulfils the character of an attesting witness also by looking at the manner in which the events have actually taken place at the time of registration and the part played therein by the Registrar. .. A Registrar of Deeds before he be termed an attesting witness, shall have to be called in the witness box. The court must feel satisfied by his testimony that what he did satisfies the requirement of being an attesting witness. Registration of a document does not dispense with

the need of proving the execution and attestation of a document which is required by law to be proved in one manner as provided in Section 68 of the Evidence Act. Under Section 68 of the Registration Act the Registrar shall endorse the following particulars on every document admitted to registration:

- (1) the date, hour and place of presentation of the document for registration;
- (2) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign of agent of any person, the signature and addition of such representative, assign or agent;
- (3) the signature and addition of every person examined in reference to such document under any of the provisions of this Act, and
- (4) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

Such particulars as are referred to in Sections 52 and 58 of the Registration Act are required to be endorsed by Registrar alongwith his signature and date on document under Section 59 and then certified under Section 60. A presumption by reference to Section 114 (Illustration (e)) of the Evidence Act shall arise to the effect that the events containing in the endorsement of registration, were regularly and duly performed and are correctly recorded. None of the endorsements, require to be made by the Registrar of Deeds under the Registration Act, contemplates the

factum of attestation within the meaning of Section 63(c) of the Succession Act or Section 68 of the Evidence Act being endorsed or certified by the Registrar of Deeds. The endorsements made at the time of registration are relevant to the matters of the registration only (See: Kunwar Surendra Bhadur Singh and Ors. v. Thakur Behari Singh and Ors., . On account of registration of a document, including a will or codicil, a presumption as to correctness or regularity of attestation cannot be drawn. Where in the facts and circumstances of a given case the Registrar of Deeds satisfies the requirement of an attesting witness, he must be called in the witness box to depose to the attestation. His evidence would be liable to be appreciated and evaluated like the testimony of any other attesting witness.

ADMISSIBILITY OF A DOCUMENT

R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Another reported in [(2003) 8 SCC 752] "20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of

documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the

evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

In a decision reported in **Bipin Shantilal Panchal vs. State of Gujarat and another (2001 (3) SCC 1)**, the Apex Court was pleased to consider the delay in disposal of a criminal case, where the Trial Court disallowed the objections of admissibility of certain documents, It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fall out of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that

evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

In **State of Bihar and Ors. v. Sri Radha Krishna Singh & Ors.**, AIR 1983 SC 684, Court considered the issue in respect of admissibility of documents or contents thereof and held as

under: "Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil."

In Madan Mohan Singh & Ors. v. Rajni Kant & Anr., AIR 2010 SC 2933, Court examined a case as a court of fifth instance. The statutory authorities and the High Court has determined the issues taking into consideration a large number of documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. The Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity.

ORAL AGREEMENT CONTRARY TO WRITTEN CONTRACT IS NOT AN EVIDENCE

S. Saktivel (Dead) by LRs v. M. Venugopal Pillai and others AIR 2000 S.C. 2633 in which it has been held by the Apex Court that modification by oral contract against the written document is excluded in terms of Section 92 of the Evidence Act.

Ishwar Dass Jain (Dead) Through LRs v. Sohan Lal (Dead) by LRs AIR 2000 SC 426 in which the Apex Court has held that oral evidence is admissible under Section 92 (1) of the Evidence Act to prove that the document, though executed, was not intended to be acted upon and that it was a sham document, executed only as a collateral security.

SHAM SALE DEED ALLEGATION - CONTENDING TO HAVE NOT ACTED UPON

Sadasivam v. K. Doraisamy **AIR 1996 SC 1724, JT 1996 (2) SC 400** in which the Apex Court has held that sale deed kept in the custody of the plaintiff alleging that the sale deed was sham and was not acted upon, and it was an invalid document being executed without any consideration on an understanding between the parties that it would not be acted upon, is a sham document.

ADMISSIBILITY OF UNREGISTERED PARTITION DEED

Siromani v. Hemkumar, A.I.R.1968 S.C.1299: Of course, the document is admissible to prove an intention on the part of the coparceners to become divided in status; in other words, to prove that the parties ceased to be joint from the date of the instrument
..

Roshan Singh v. Zile Singh, A.I.R.1988 S.C.881 : It is well-settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family co-tenants.

DOCUMENT SHOULD BE READ AS A WHOLE FOR ITS INTERPRETATION

Syed Abdulkhader vs Rami Reddy & Ors 1979 AIR 553, 1979 SCC (2) 601 A document will be considered as a whole for interpretation of particular words or directions. An ordinary authority given in one part of the instrument will not be cut down because there are ambiguous and uncertain expressions elsewhere. A power of wide amplitude conferring wide authority cannot by construction be narrowed down to deny an authority which the donor expressly wanted to confer.

The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used.

Constitution bench in Ramkishore Lal vs. Kamal Narain: MANU/SC/0022/1962 - AIR 1963 SC 890 Very often the status

and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyancer, a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens ? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See *Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo*) MANU/SC/0246/1960 : [1960]3SCR604 . It is clear, however, that an attempt should always be made to read the two parts of the documents harmoniously, if possible. It is only when this is not possible, e.g., where an absolute title is given in clear and unambiguous terms and the later provisions

trench on the same, that the later provisions have to be held to be void.

Gurubasappa And Ors. vs Gurulingappa AIR 1962 Mys 246, ILR 1961 KAR 878 In deciding this question, it would be necessary to consider the true scope and effect of sections 91 and 92 of the Evidence Act. Chapter VI of the Evidence Act which begins with section 91 deals with the exclusion of oral evidence by documentary evidence, section 91 of the Act provides: "When the terms of a contract, or a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained". The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is described as best evidence rule. The best evidence about the contents of a document is the document itself and it is the production of the document that is required by section 91 in proof of its contents. In a sense the rule enumerated by section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of a document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act. Section 92 of the Evidence Act

runs as follows: "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms". It is manifest that section 92 excludes the evidence of oral agreement and it applies to cases where the terms of a contract, grant or other disposition of property have been proved by the production of the relevant documents themselves under section 91 of the Act. In other words, after the document had been produced to prove its terms under section 91, the provisions of section 92 of the Act come into operation for the purposes of excluding the evidence of any oral agreement or the statement for the purpose of contradicting, varying, adding to or subtracting from its terms. It would be noticed that sections 91 and 92 are in effect supplementary to each other. Section 91 would be frustrated without the aid of section 92 and section 92 would be inoperative without the aid of section 91. Since section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under section 91, it may be said that it makes the proof of the document conclusive of its contents. Like section 91, section 92 can be said to be based on best evidence rule.

Bhinka And Others vs Charan Singh 1959 AIR 960, 1959 SCR Supl. (2) 798 " The Court shall presume to be genuine every

document purporting to be a certificate..... which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer -of the Central Government or of a State Government..... Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper ". Under this section a Court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document. But such a presumption is permissible only if the, certified copy is substantially in the form and purported to be executed in the manner provided by law in that behalf.

C.H. Shah vs S.S. Malpathak And Ors. AIR 1973 Bom 14,

Section 79 only raises a rebuttable presumption with regard to the genuineness of certified copies and that too only if they are executed substantially in the form and in the manner provided by law.Section 79, as laid down by the Supreme Court in Bhinka's case already referred to above it must be shown that the certified copy was executed substantially in the form and in the manner provided by law. There would, therefore, be a check or safeguard in so far as the officer certifying it in the

manner required by law would have to satisfy himself in regard to the authenticity of the original and in regard to the accuracy of the copy which he certifies to be a true copy thereof. On the other hand if the original of a public document is to be admitted in evidence without proof of its genuineness, there would be no check whatever either by way of scrutiny or examination of that document by an officer or by the Court.

THE BURDEN OF PROOF IS HEAVY ON A PERSON QUESTIONING THE SALE DEED AND CLAIMING THE SAME TO BE NOMINAL

In Vimal Chand Ghevarchand Jain V. Ramakant Eknath Jajoo (2009(2) CTC 858), the Supreme Court had held as follows: The burden of proof is heavy on a person questioning the sale deed and claiming the same to be nominal. He should adduce proper extrinsic evidence to establish his case. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance. The deed of sale was a registered one. It, therefore, carries a presumption that the transaction was a genuine one. The pleadings were required to be considered provided any evidence in support thereof had been adduced. No cogent evidence had been adduced by the respondent to show that the deed of sale was a sham transaction and/or the same was executed by way of a security. The deed of sale being a registered one and apparently containing stipulations of transfer of right,

title and interest by the vendor in favour of the vendee, the onus of proof was upon the defendant to show that the said deed was, in fact, not executed or otherwise does not reflect the true nature of transaction. Evidently, with a view to avoid confrontation in regard to his signature as an attesting witness as also that of his father as vendor in the said sale deed, he did not examine himself. An adverse inference, thus, should have been drawn against him. When a true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible. Therefore, it was open to the respondent to adduce oral evidence in regard to the nature of the document. The document in question was not only a registered one but also the title deeds in respect of the properties have also been handed over. Symbolical possession if not actual physical possession, thus, must be held to have been handed over. It was acted upon. Appellants started paying rent in respect of the said property. No objection thereto has been raised by the respondent. Pleadings of the parties, it is trite, are required to be read as a whole. Defendants, although are entitled to raise alternative and inconsistent plea but should not be permitted to raise pleas which are mutually destructive of each other. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct. Equally well settled is the principle of law that an admission made by a party in his pleadings is admissible against him *proprio vigore*. Therefore, the deed of sale was required to be construed in proper perspective. Indisputably, the deed of sale contained stipulations as regards passing of the

consideration, lawful title of the vendor, full description of the vended property, conveyance of the right, title, interest, use, inheritance, property, possession, benefits, claims and demands at law and in equity of the vendor. A document, must be construed in its entirety. Reading the document in question in its entirety, there cannot be any doubt whatsoever that it was a deed of sale. It satisfies all the requirements of a conveyance of sale as envisaged u/s. 54 of the Transfer of Property Act. Right of possession over a property is a facet of title. As soon as a deed of sale is registered, the title passes to the vendee. The vendor, in terms of the stipulations made in the deed of sale, is bound to deliver possession of the property sold. If he does not do so, he makes him liable for damages. The indemnity clause should have been construed keeping in view that legal principle in mind. The stipulation with regard to payment of compensation in the event appellants are dispossessed was by way of an indemnity and did not affect the real nature of transaction. In any event, the said stipulation could not have been read in isolation. Such a case had never been made out and hence cannot be allowed to be raised for the first time before this court. In any event, in view of the conduct of the respondent, he cannot claim equity. An equitable relief can be prayed for by a party who approaches the court with clean hands.

THE HON'BLE MR. JUSTICE N KUMAR of Karnataka High Court in Sheik Mehamood vs Mohammed Sabder Decided on 25 September, 2012 Strangely, the relinquishment deed is

executed in favour of a person who is not a member of the family. The relinquishment deed presupposes antecedent title. If more than one person has the antecedent title to the property, it is open to one person to relinquish his title in favour of the person who is having the antecedent title. The relinquishment deed cannot be in favour of a person who has not title at all. It is compulsorily registrable. It is not registered. Therefore the effect is, no right, title or interest of the executant is transferred to the person in whose favour the property is released. Unfortunately, the trial Court in the first place did not take the trouble of looking into the document. If only it had looked into the document, it would have known that there is no signature of the executant on the said document. Therefore the said document cannot be held against the plaintiffs. It also failed to notice that it is not a registered document. Unless the document is registered, the transfer of right in an immovable property cannot take place. Therefore under the said document there cannot be any transfer of right of Basheer Sab in favour of any person. Strangely, the trial Court relies on Section 90 of the Evidence Act. Section 90 of the Evidence Act states about the presumption as to documents thirty years old. It states that: "90. Presumption as to documents thirty years old- Whether any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly

executed and attested by the persons by whom it purports to be executed and attested." The condition precedent for application of Section 90 is that the said document should bear the signature of the person who is said to have executed the document. If there is no signature at all on the document, Section 90 of the Act is attracted. Section 90 does not have the effect to nullifying the requirement of registration of the document under the Indian Registration Act. If a document is compulsorily registrable and it is not registered and if that document is produced before the Court and the if the document is 30 years old, any presumption in so far as registration cannot be drawn. All that Section 90 says is because of lapse of time of 30 years, if a document is produced from a proper custody if that document bears the signature and if attestation is required, it bears attestation, the Court may presume that the document when it was executed was duly executed by the person whose signature is found thereon and if it is a case of proof of attestation, the signature of the attesting witnesses were duly executed. When the document is not executed at all, Section 90 has no application.

Vidhyadhar vs Manikrao & Anr. AIR 1999 SC 1441, 1999 (3) ALT 1 SC, JT 1999 (2) SC 183 The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person

are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of whole of the price at the time of the execution of sale deed is not sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs. 100/-, the sale would be complete. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in presenti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record..... The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage.

(2007) 13 SUPREME COURT CASES 210 ASOKAN V. LAKSHMIJKUTTY AND OTHERS, certain excerpts from it would run thus: "16. While determining the question as to whether delivery of possession would constitute acceptance of a

gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the defendants contend that the donee was to perform certain obligations, is itself indicative of the fact that the parties were aware thereof. Even a silence may sometimes indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

SOME BRIEF CITATION POINTS ON DOCUMENTS

- Non mentioning of survey number will not render the mother document void so also the area of the subject matter. Mithukhan case: AIR 1986 MP 39.
- If the language employed has ambiguities to enter into it, then intention of the parties has to be gathered by overall survey of the contents of the document in question. P.L.Bapuswami case: AIR 1966 SC 902.
- If a document is relatively 30 years old and was obtained from proper custody, then its contents have to be presumed genuine. Smt Anika B. case: AIR 2005 MP 64.
- Just by name true nature of document cannot be disguised nor be treated otherwise. AIR 1958 SC 532.

- For clear identification of any immoveable property, the deed should be very clear about the schedule or boundaries of the property. If the boundaries are disputed, their description resolves the dispute. M. Dhondusa Religious and Charitable Trust case: ILR 2002 Kar 4832.
- If one interpretation could give effect to all parts of the deed and other renders some clauses nugatory, then, the interpretation that gives effect to all clauses should be preferred. Radha Sundar Dutta case: AIR 1959 SC 24. D.D.A. case: AIR 1973 SC 2609.
- In case of contradictions in statements of document about area and boundaries the boundaries shall prevail. M/S Roy &co case: AIR 1979 Cal 50.
- In case of contradictions between the map and mother deed, the mother deed should prevail. Narain Prasad Singh case: AIR 1983 Pat 244.
- In case of ambiguity with regard to description of property, description as can be ascertained from the boundaries will settle the issue. Babji Dehuri case: AIR 1996 Ori 183.
- In case of contradictions between description and boundaries regarding location of the property, the boundaries

shall prevail. Tranglaobi pisciculture co-op soc ltd case: AIR 1969 Mani 84.

➤ Plan appended to a document forms part of that document. If a plan is so appended, extent cannot be determined solely based on measurements ignoring the map. Sumathy Amma case: AIR 1987 Ker 84.

➤ Ownership of surface of the land confers ownership of every thing beneath the land unless a reservation was made by transferor while transferring the ownership. Raja Anand Brahma Shah case: AIR 1967 SC 1081. Sukhdeo Singh case: AIR 1951 SC 288.

➤ Unless other wise provided by the recitals, trees standing on the land will also pass along with the land. DFO sarahan forest division H.P.case: AIR 1968 SC 612.

➤ In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. ONGC ltd case: AIR 2003 SC 2629.

➤ Where there is a documentary evidence, oral evidence is not entitled to any weight. Murarka Properties (p) ltd AIR 1978 SC 360.

- While interpreting the document the document in question should be read as a whole. Therefore , if one clause of the document is invalid or otherwise, that one clause itself will not render the whole document invalid. AIR 1956 SC 46.
- It is common knowledge that laymen do not know nor care about the niceties of drafting. They cannot be expected to possess the expertise of a professional. Therefore, technical rules that are generally applied to the provisions of law and exceptions should not be applied while interpreting such documents or deeds. AIR 1951 SC 293.
- The cardinal rule of construction is that a document must be read as a whole, each clause being read in relation to the other parts of the document, and an attempt should be made to arrive at an interpretation which will harmonize and give effect to other clauses thereof. It is not legitimate to pick out an expression torn from its context and try to interpret the document as a whole in the light of that expression. Such a forced construction on the document in question cannot defeat the very object which its executants had in view. Shri Digambar Jain and others case: AIR 1970 MP 23(26) [FB].
- Where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, the later provisions have to be held to be void. Ramkishorelal case: AIR 1963 SC 890.

- It is well settled that general words of release do not mean release of rights other than those put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed. *Rajagopal Pillai and another case* AIR 1975 SC 895.(897).
- In construing documents usefulness of the precedents is usually of a limited character, after all the courts have to consider the material and relevant terms of the document with which they are concerned and it is on a fair and reasonable construction of the terms that the nature and character of the transaction evidenced by it has to be determined. *Trivenibai case*: AIR 1959 SC 620(622).
- The obligations in the deed which is in the nature of trust is an obligation which can be specifically enforced. *Bai Dosabai Mathurdas Govinddas and others case*: AIR 1980 SC 1334.

A PARTY TO AN INSTRUMENT CANNOT BE A VALID ATTESTING WITNESS TO THE SAID INSTRUMENT

Laxmibai (Dead) Thru Lrs. & Anr. vs Bhagwanthbuva (Dead) Thru Lrs 2013 (2) JT 362 = 2013 (2) SCALE 106 A party to an instrument cannot be a valid attesting witness to the said instrument, for the reason, that such party cannot attest its own signature. (Vide: *Kumar Harish Chandra Singh Deo & Anr. v. Bansidhar Mohanty & Ors.*, AIR 1965 SC 1738). ... A

document must be construed, taking into consideration the real intention of the parties. The substance, and not the form of a document, must be seen in order to determine its real purport.

INTENTION MUST PRIMARILY BE GATHERED FROM THE MEANING OF THE WORDS USED IN THE DOCUMENT

In Delta International Limited v. Shyam Sundar Ganeriwalla & Anr., AIR 1999 SC 2607, this Court held that the intention of the parties is to be gathered from the document itself. Intention must primarily be gathered from the meaning of the words used in the document, except where it is alleged and proved that the document itself is a camouflage. If the terms of the document are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for the purpose of ascertaining the real relationship between the parties. If a dispute arises between the very parties to the written instrument, then intention of the parties must be gathered from the document by reading the same as a whole.

In Vodafone International Holdings B.V v. Union of India & Anr., (2012) 6 SCC 613, while dealing with a similar situation, this Court held: "The Court must look at a document or a transaction in a context to which it properly belongs to. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a

document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so in not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is that series or combination which may be regarded."

T.L. Nagendra Babu vs Manohar Rao Pawar ILR 2005 KAR 884 Presumption operates in favour of the party relying on a document, provided he must prove that the document is duly executed and authenticated.

INTERPRETATION OF A DOCUMENT

The principle of interpretation of a document is laid down by the Apex Court in its judgment in the case of Kamla Devi v. Takhatmal and another, reported in AIR 1964 SC 859. The relevant portion contained in para 8 of the said judgment is reproduced below : "8. ... Section 94 of the Evidence Act lays down a rule of interpretation of the language of a document when it is plain and applies accurately to existing facts. It says that evidence may be given to show that it was not meant to apply to such facts. When a Court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous

and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions. Sometimes when it is said that a Court should look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply, accurately to existing facts. But if the words are clear in the context of the surrounding circumstances, the Court cannot rely on them to attribute to the author an intention contrary to the plain meaning of the words used in the document. ..."

Cheedella Radhakrishna Sharma and Ors. vs. Radhakrishnamurthy and Ors.: MANU/AP/2751 /2014 -

Coming to the law on proof of documents and contents vis-à-vis interpretation and construction of deeds & documents-in particular testamentary, proof of due execution, attestation and contents, relevancy and admissibility-including for collateral purposes, probative value and presumptions: Interpretation is in fact a matter of communication of what wants to know and understand from what is said, in giving the meaning to the words of the document from mind of the person who has executed/written it, by reading of the document as a whole and not from nomenclature or pick and choose sentences-see also State of Orissa v. Titaghur Paper Mills Ltd., MANU/SC/0325/1985 : AIR 1985 SC1293. Interpretation is

ascertaining the meaning and Construction is ascertaining the spirit.

15(a)(i). Coming to the proof: Once a document is properly admitted, the contents of those documents are also admitted in evidence, though those contents may not be treated as conclusive evidence-*vide*-P.C. *Purushothama Reddiar v. Perumal* MANU/SC/0454/1971 : AIR 1972 608. It is the settled law that the question of mode of proof is a question of procedure and is capable of being waived. It is to say when original not produced but copy of it for no objection raised after admissibility, the objection cannot later be raised being deemed waived; whereas proof of contents of the document is being substantive, the non-raising of objection is not a waiver *vide* *R.V.E. Venkatachala Gounder v. A.V. & V.P. Temple* MANU/SC/0798/2003 : AIR 2003 SC 4548 : 8 SCC 752. Following the above, it was also held in *Dayamathi Bai v. K.M. Shaffi* MANU/SC/0580/2004 : AIR 2004 SC 4082 : 7 SCC 107 that ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the

objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first

case, acquiescence would be no bar to raising the objection in a superior court." Further, like an inadmissible evidence oral or documentary by consent cannot be made admissible by mere consent or no-objection while marking; what is not relevant under the Evidence Act, cannot in proceedings to which the Evidence Act applies, be made relevant by consent of parties. Thus, only admissible and relevant evidence can be brought on the record for consideration of the court without following the regular mode if parties agree. The reason behind this rule is that it would be unfair to ask any party to prove a particular fact when the other party has already admitted that the way it had been brought before the court has sufficiently proved it. Where, therefore, a party not only raised no objection to certain evidence being brought on record but indeed appeared to have invited the adjudicating authority to act on such evidence, it cannot be allowed later on to object to such evidence having been considered by such authority merely because the decision has gone against it-*vide*-Kalyan Peoples' Co-operative Bank Ltd. v. Dulhanbibi MANU/SC/0003/1962 : AIR 1966 SC 1072. Whereas in the case of Will unless it is proved of due execution by attestation as part of execution contemplated by Section 63 of the Indian Succession Act, of the requirement of testator must sign the Will in the presence of attestors or should personally acknowledge his signature in the presence of attestors, a Will is inadmissible and mere marking is not enough to admit even no objection raised *vide* Dr. M. Ratna v. Kottiboyina Navaneetham MANU/AP/0026/1994 : AIR 1994 AP 96. It is also held that without the statutory requirements of due execution of Will, it

cannot be admitted vide Yumnum O.T.I. Devi v. Yumnum J.K. Singh MANU/SC/0366/2009 : 2009(4)SCC 780

15(a)(ii). Nature of Documents: Documents may contain either unilateral or bilateral dispositions or even with reciprocal. Further, testamentary or non-testamentary. Further, transfer of rights or division and separation of existing or joint rights. Further, any dispositions, transfer of rights or creating rights may be either present or future. Furthermore, it affects the rights of even non parties to the documents at times like in boundary recitals.

15(a)(iii). Construction of Documents/instruments: Generally in construing instruments, Court must have regard not only to the presumed intention of the parties but also to the meaning of the words which they have used-vide- V.S. Talwar v. Premchandra MANU/SC/0372/1984 : AIR 1984 SC 664 at para-7.

15(a)(iv). Interpretation of Documents: Every instrument has to be so interpreted as to accord with the intention of its maker having regard to the language used; though one cannot ignore actual words used and go after the supposed intention of maker, since that would amount to entering the arena of speculation, but all the same said principle is unexceptionable-vide-Hind Plastics v. Collector of Customs MANU/SC/0784/1994 : (1994) 5 SCC 167 at para-17.

15(a)(v). Coming to the admissibility and relevancy and probative value of recitals of the boundaries etc., in documents: Recital in a document of neighboring land, referring one of its boundary as suit land and it belongs to a particular person, for

the person to rely on it, is not legal evidence and the same is not even admissible under Section 32(2) of the Evidence Act-vide in re Daddapaneni Narayanappa MANU/TN/0703/1910 : 1910 Indian Cases page-286 (Madras). It was held in Karupaanna Konar v. Rangaswami Konar MANU/TN/0400/1927 : AIR 1928-Madras-105(2) at page-106 that, a mere statement of boundary cannot be classed with any of the verbs in Section 13 of the Evidence Act of created, modified, recognised, asserted or denied and is therefore not admissible; the same is not even admissible under Section 32(3) of the Evidence Act as it is a statement and not the document containing the statement that must be against the proprietary interest of the person making it. It was held further that the lower court influenced by the idea of the document is an ancient one and the recitals obviously not intentionally false and are therefore presumably true; having overlooked the fact that parties making statements which are not material to their interests have no occasion to be accurate. In Ramacharandas v. Girijachanddevi MANU/SC/0358/1965 : AIR 1966-SC 323 it was held that the recitals in a document would operate as an estoppel against the author of the document. The only restriction in this regard is that, an estoppel is confined to the transaction covered by the document and the recital cannot be treated as an estoppel in a collateral transaction. Even this principle has several ramifications- For Example: if the deed is fairly old, the recitals cannot be altogether discarded and such recitals gain sufficient weight with the passage of time even as regards collateral transactions. This however depends upon the facts and circumstances of each case. An important area of

interpretation of documents is the realm of the nature of the document. Ascertainment of nature of document including from the contents and attending circumstances, intention of the executant (unilateral) and parties to it (bilateral) assumes importance as law prescribes different patterns and procedures for different types of transactions covered by the documents and its execution and proof. It was laid down in *Rangayyan v. Inasimutthu* AIR 1956-Madras-226 that, recitals of the boundaries in a document inter-parties is admissible as a joint statement of the parties executed it to act as admission, where as recitals of a document between a party and stranger is relevant against the party as an admission but is not admissible in his favour unless the fact recited is deposed by executants of the document in Court to act as a corroborative evidence under Section 157 of the Evidence Act or to contradict under Sections 145 & 155(3) of the Evidence Act; whereas recitals as to boundaries in the document between third parties, it is not ordinarily admissible to prove possession or title as against a person, who is not party to the document, but for at best to corroborate or to contract. The probative value to be attached to such recitals in the documents even admitted in evidence is depending upon the facts and circumstances of each case right from "0" to clinching evidence as the case may be from material on record of the respective cases-See also *Umarapartvathy Vs. Bhagvathy Amma* MANU/TN/0317/1972 : AIR 1972 Madras-151.

15(a)(vi). Documents executed ante-(pre-liti), pendenti and post-litem motam: In *Harihar Prasad Singh v. Deonarayan*

Prasad AIR 1956-SC-305 - it was held in para-5 that recitals in the documents executed ante(pre-liti) litem motam and inter parties held of considerable importance and their probative value as against them is high from the recital of private lands of the proprietor (which includes de facto/dejure) in assertion of their title and for its admissibility under Section 13 of the Indian Evidence Act. It was however, observed that the respondents are right in contending that the recitals cannot be considered as admissions by the mortgagees as they were executed by the mortgagors. It is also held in Rangayyan v. Inasimutthu (supra) that depending upon the recitals in the documents executed ante-pre, pendent and post-litem motam and from nature of recitals and other circumstances of between inter parties or third parties; the probative value to be attached to such recitals in the documents even admitted in evidence is depending upon the facts and circumstances of each case right from "0" to clinching evidence as the case may be from material on record of the respective cases. In Dolgobinda Paricha v. Nimai Charan Misra MANU/SC/0188/1959 : AIR 1959-SC-914 - it was held that-it is also well settled that statements or declarations before persons of competent knowledge made ante litem motam are receivable to prove ancient rights of a public or general nature. The admissibility of such declarations is, however, considerably weakened if it pertains not to public rights but to purely private rights. It is equally well settled that declarations or statements made post litem motam would not be admissible because in cases or proceedings taken or declarations made ante litem motam, the element of bias and concoction is eliminated. Before,

however, the statements of the nature mentioned above can be admissible as being ante litem motam they must not only be before the actual existence of any controversy.

15(a)(vii). Presumption of thirty years old document: In Harihar Prasad Singh(supra)-it was also held by placing reliance upon the expression in Basanth Singh v. Brijraj Sadan Singh MANU/PR/0038/1935 : AIR 1935 PC 132 (c)- regarding presumption of thirty years old document under Section 90 of the Indian Evidence Act that, a presumption can be raised only with reference to original document and not to copies thereof. If the document happens to be signed by the agent of the person against whom the presumption is sought to be raised and there is no proof that he was an agent, Section 90 does not authorize the raising of a presumption as to the existence of authority on the part of the agent to represent that person. In Union of India v. Ibrahim Uddin MANU/SC/0561/2012 : 2012(6)SCJ-432=Civil Appeal No. 1374/2008, dt.17-07-2012- it was held regarding presumption of thirty years old document under Section 90 of the Indian Evidence Act, that the presumption is in respect of genuineness of a document as regards signature, execution and attestation, but not as regards the correctness of the contents of the document. In T. Ramesh v. Lakshamma MANU/AP/0239/1999 : 1999 (2)-ALT-553, it was held referring to H. Venkatachala v. B.M. Thimmajamma MANU/SC/0115/1958 : AIR 1959 -SC-443 and Dhanapala v. Govindaraju MANU/TN/0212/1961 : AIR 1961-Madras-262 and extracts from Tailor's Law of Evidence & Halsbury's Law of England that, law recognizes a conclusive presumption in favour

of due execution of insured deeds and Wills when those instruments are 30 years old and are unblemished by any alterations and are produced from natural custody, they are said to be proved themselves. A bare production is sufficient and the scribe and witnesses being presumed to be dead and in the absence of circumstances of suspicion to have been duly sealed, attested, delivered or published according to their purport, when those are above 30 years produced from proper custody in saying that those are by production said to be proved themselves. The proper custody is in the custody of a person, who might be reasonably and naturally be expected to have possession of them. It would be dangerous no doubt for the courts to draw presumption of due execution mechanically on the face of the documents purporting to be 30 years old; and coming from proper custody in as much as the presumption dispense with proof of due execution, thereby the Court must act with extreme caution and utmost circumspection from the language used "May presume" in Section 90 of the Evidence Act conferring judicial discretion to be exercised by the Court in drawing the presumption. It is within the judicial discretion of the Court having regard to facts and circumstances of each case. See also Ch. Adishesamma v. Rama Rao MANU/AP/0078/1973 : AIR 1973 AP 149

15(a)(viii). Attestation of a document is when to attribute knowledge of its contents: In Pandrang Krishnaji v. N. Tukaram MANU/PR/0132/1921 : AIR 1922 PC 20- it was held on how far mere attestation of a document is to attribute knowledge of its contents and whether to say he attested with knowledge and

consented to the transfer, that the attestation of a deed by itself estops a man from denying nothing whatsoever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document and it ought not to be put to word alone for the purpose of establishing that a man consented to the transaction which the document effects. Mere attestation does not affect as an estoppel, for attestation does not fix the attesting witness with knowledge of contents of the document or implying consent for the contents of the document, unless it is established by the independent evidence that to the signature was attached the express condition that it was intended to convey something more than mere witnessing to the execution and was meant as involving consent to the transaction - vide *Rajyammal v. Sabhapathi* MANU/PR/0023/1944 : AIR 1945 PC 82 & *Pandrang* (supra).

15(a)(ix). Attestation of a document and mode of proof: Section 3 of the Transfer of Property Act, defines attestation in relation to an instrument (to mean non-testamentary-though same analogy applies to testamentary with reference to Section 63 of the Indian Succession Act), means and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executants a person acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the

executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary. As per the Apex Court's expression in *Abdul Jabbar v. Venkata Shastry* MANU/SC/0019/1969 : AIR 1969 SC 1147 - to attest is to bear witness to a fact. The essential conditions of a valid attestation are that two or more witnesses have seen the executant sign or affix his mark to the instrument, or have seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executants a person acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executants to bear the witness to this fact, it is essential that the attesting witness has put his signature animus attestandi that is for the purpose of attesting the signature of the executant. See the discussion supra of mere attestation is not suffice to attribute knowledge of contents.

15(a)(x). As per Section 68 among Sections 68 to 71 of the Indian Evidence Act, regarding of the proof of an attested instrument(other than Will), it is unnecessary to call any attesting witness in the case of compulsory attestable deed, unless execution of the deed is specifically denied by the person by whom it purports to have been executed. If the execution is specifically denied one attesting witness must be called upon to prove the deed-if there be one alive and subject to the process of the Court. If the attesting witnesses are dead their signature can be proved by other evidence of person acquainted with or opinion from comparison with signature/handwriting/thumb impression

as the case may be (under Sections 47 & 67 and or Sections 45 r/w. 51 and or Section 73 of the Evidence Act).

15(a)(xi). A composite document which is severable and in part clearly testamentary, such part may take effect as a Will and other part if it has the characteristics of a settlement and that part will take effect in that way. A document which operates to dispose of property in praesenti in respect of few items of the properties is a settlement and in future in respect of few other items after the deeds of the executants, it is a testamentary disposition. That one part of the document has effect during the life time of the executant i.e. the gift and the other part disposing the property after the death of the executant is a Will and in such case stamp and registration are compulsory - vide *Rev. Fr. M.S. Poulouse v. Varghese and others* MANU/SC/1015/1995 : (1995) Supp 2 SCC 294.

15(b)(i). In the interpretation of Wills in India, regard must be had mainly to the rules of law and construction contained in Part VI of the Indian Succession Act and particularly Section 88 of the Indian Succession Act and not the rules of the Interpretation of Statutes - vide *Mathai Samuel v. Eapen Eapen (dead)* by Lrs MANU/SC/0996/2012 : 2013(1 ALT(1)(SC).

15(b)(ii). In *Narendra Gopal v. Rajat Vidhyardhi* MANU/SC/8433/2008 : (2009) 3 SCC 287 at para-32(cl.3) it was held that, in appreciating the documents of unilateral dispositions and testamentary dispositions like Wills, the true intention of the testator (executant) has to be gathered, not by attaching importance to isolated expressions but by reading the document as a whole.

15(b)(iii). The nomenclature given by the parties to the transaction in question is not decisive, but the contents and the intention of the executant, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. One need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain. The real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift/settlement is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in praesenti in favour of the beneficiaries or it intended to transfer interest in favour of the beneficiaries only on the death of the executant.

15(b)(iv). "Will" as defined in Section.2(h) of the Indian Succession Act- means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". 'Will' is derived from the Latin word "Voluntas" to mean expression of intention of a testator generally in a document. 'Testament' is derived from the Latin word "Testatio-mentis" to mean testifies the determination of the mind. Thus, it is a legal declaration of a person's intention to take effect after death of that person. According to Schouler's - law of Wills, a Will is the aggregate of man's testamentary intention so far as the same is manifested in writing and duly executed according to the Statutes.

15(b)(v). Lord Wilmot, C.J. in *Doe Long v. Laming* (2 Burr. at pp.11-12) described the intention of the testator as the "pole star" and is also described as the "nectar-of the instrument".

15(b)(vi). Underhill & Strahan on interpretation of Wills and Settlements-(1900 Edn.), while construing a Will stated that "the intention to be sought is the intention which is expressed in the instrument not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written Instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention....."

15(b)(vii). In Halsbury's Laws of England, 4th Edn., Vol.50, P.239, it is stated: "408.The only principle of construction which is applicable without qualification to all Wills and overrides every other rule construction, is that the testator's intention is collected from a connection with any evidence properly admissible and tile meaning of the Will and of every text of it is determined according to that intention."

15(b)(viii). 'Will' therefore has the four essentialities- (i) It must be a legal declaration of testator's intention, (ii) That declaration must be with respect to his property, (iii) The desire of the testator that the declaration should be effected after death of testator and (iv) The other Essential quality of testamentary disposition is ambulatoriness of revocability during executants' lifetime. Such a document is dependent upon executants' death for its vigour and effect. A Will need not be stamped under the Indian stamp Act and need not be necessarily registered being optional under Section 18 of the Indian Registration Act. It is

different to Gift or Settlement or other disposition by transfer of rights in immovable property worth above Rs. 100/- which necessarily be registered under Section 17 of the Indian Registration Act, besides duly stamped, though when stamped or impounded and even unregistered can be admitted for collateral purpose under Section 49 of the Indian Registration Act. So far as Will concerned when it is required to be proved as contemplated by Sections 68-71 Indian Evidence Act and Section 63 Indian Succession Act, till then it cannot be used even for collateral purpose (for the reasons stated with reference to the existing law of the land in the earlier paras). In *Paranru Radhakrishnan v. Bharathan* MANU/KE/0030/1990 : AIR 1990 Kerala 146 it was held that the imperative and clear straight wording of Section 68 Evidence Act makes it clear that it does not permit the use of a document which is required by law to be attested as evidence until it is proved strictly in accordance with the provisions of the Section.

15(b)(ix). Though registration is optional and not compulsory and non registration is by itself not a ground to doubt, registration is one of the positive circumstances to infer in favour of due execution, unless evidence on record shows otherwise. Registration of Will being optional, mere registration does not dispense with the proof of execution and attestation, but for to serve only a piece of evidence of the execution. That It is also of the reason that Will operates after the death of the testator and in his life time he can alter or cancel the bequeaths by codicil or fresh Will any number of times as facts and circumstances shown permitted and thereby also the last

disposition prevails over the earlier even in same document for same property in case of inconsistent bequeaths. In Shivdev Kour v. R.S. Grewal MANU/SC/0260/2013 : 2013(3)ALT-1(SC) para-12 & in Balwant Kour v. Chanan Singh MANU/SC/0282/2000 : AIR-2000-SC-1908 it was held that all the clauses of the Will must be read together to find out the intention of the testator. This is obviously on the principle that the last clause represents the latest intention of the testator(See also Section 88 of the Indian Succession Act).

15(b)(x). Will as can be said speaks from the grave of the testator as executant of the Will cannot be called upon to admit or deny execution, much less to explain any circumstances surrounding the execution and testamentary capacity and condition with reference to sound and disposing state of mind and thus for appreciating the evidence of due execution and genuineness of bequeaths, the court Will put itself in to the armchair of the executant/testator. The intention of the testator in this regard must be ascertained not only from the words used, but also from surrounding circumstances with reference to the unimpeachable evidence regarding genuineness and authenticity as well as probabilities and improbabilities and unnatural or unfair bequeaths with reference to the direct or indirect beneficiaries of the bequeaths in the Will/testament known as pronouncer/s influence and role as to not a free Will and volition of the testator in making the bequeaths and reasons or circumstances in relation to natural heirs and their relation with the testator for ignoring and making bequeaths to other than natural heirs or preferring among the natural heirs or preferring

other than natural heirs also as the legates. If in relation to the above or otherwise, there are any suspicious circumstances or cloud shrouded around the execution and in the bequeaths, the propounder has to discharge of the burden lies on him to prove and dispel the suspicious circumstances to clear the cloud and probablises the genuineness of execution and the bequeaths as per free will and volition of testator as mere ignoring the natural heirs or preferring among them or preferring other than natural heirs also by itself not a ground to doubt genuineness for the reason that the testamentary dispositions by Will itself is to interfere or alter or divert the natural line and of flow from the intestate succession and survivorship by reducing or depriving the share of natural heirs if any at the discretion and Will of the testator. Apart from it, it is it is absolutely necessary of execution of the Will under Section 63 of the Indian Succession Act to prove that the Will was attested by the two attesting witnesses at least who saw the testator sign the Will or the testator must personally acknowledge the signature on the Will that of him in the presence of the two attesting witnesses and they themselves signed the same in the presence of the testator. Without attestation, execution of the deed of Will is not valid. When no witness deposed of the alleged Will was signed by the deceased in his presence or that he had attested the document, execution of the very Will can be held as not proved. A reading of even Section 68 of the Evidence Act shows that attestation and execution are the two different acts one following the other. Where the Will is registered and there are signatures of registering officer and of identifying witnesses affixed to registration endorsement,

endorsement by sub-registrar that executant has acknowledged execution before him amounts to attestation and when all they deposed the same of due execution and attestation, it is a compliance of Section 63 Indian Succession Act. It is for the Court to appreciate from the above, including intention of the testator with reference to contents, other attending facts and surrounding circumstances like considerations in making bequeaths instead of allowing the estate by intestacy to claim legal heirs equally, motive of the testator in the recitals even by making dispositions to the natural heirs who otherwise even succeed, propounder influence if any, needless to say propounder of the Will has to dispel with the suspicious circumstances shrouded around the Will and its execution and manner of dispositions, the position of the testator, his family relationship and preference of some among the family members or preference of some other than the family members and among the legal heirs remote to the nearest and other considerations in making bequeaths, propounder influence-(irrespective of not direct beneficiary). There are no set parameters to judge all these aspects but for within these broad guidelines to appreciate the evidence on record of the case on hand within the ordinary and reasonable prudence to arrive at a just conclusion, for each case depends on its own facts- vide decisions in Raghunath Prasad Singh v. Deputy Commissioner MANU/PR/0150/1929 : AIR 1929 PC 283, Mokshada Ranjan v. Surendra Bijos MANU/WB/0174/1938 : AIR 1939 Calcutta-40, Dasarath Gayan v. Satyanarayana Ghosh MANU/WB/0058/1963 : AIR 1963 Calcutta-325, Lalta Baksh v. Phool Chand

MANU/PR/0012/1945 : AIR 1945 PC 113, Kapuari Kuer v. Shamnarain Prasad MANU/BH/0034/1962 : AIR 1962 Patna-149, Savitri Ammal v. State AIR 1960 Madras 217, Dr. M. Ratna v. K. Navaneetam MANU/AP/0026/1994 : AIR 1994 AP 96, Ram Gopal v. Nandlal MANU/SC/0044/1950 : AIR 1951 SC 139, Gnanambal Ammal v. T.Raju Iyyer MANU/SC/0045/1950 : AIR 1951 SC 103, Raj Bhajrang Bahadur Singh v. Thakurian Bhaktaraj Kuer MANU/SC/0081/1952 : AIR 1953 SC 7, Girja Dutt v. Gangotri Dutt MANU/SC/0092/1955 : AIR 1955 SC 346, H. Venkatachala Iyengar v. B.N. Timma rajamma MANU/SC/0115/1958 : AIR 1959 SC 443, Kameswara Rao v. B. Surya Prakasa Rao MANU/AP/0088/1962 : AIR 1962 AP 178, Rani Purnima Devi v. Kumar Khagrendra Narayan Deb MANU/SC/0020/1961 : AIR 1962 SC 567, Peareylal v. Rameswar Das MANU/SC/0398/1962 : AIR 1963 SC 1703, The Constitutional Bench expression in Shashi Kumar Benarji v. Shubodh Kumar Benarji MANU/SC/0278/1963 : AIR 1964 SC 529, T.V. Kaur MANU/SC/0248/1963 : AIR 1964 SC 1323, Surendra Pal v. Dr (Smt) Saraswathi Arora MANU/SC/0289/1974 : AIR 1974 SC 1999, Beni Chand v. Kamala Kunwar MANU/SC/0297/1976 : AIR 1977 SC 63, Jaswant Kaur v. Amrit Kaur MANU/SC/0530/1976 : AIR 1977 SC 74, Brijmohanlal Arora v. Giridharlal Manocha MANU/SC/0249/1978 : AIR 1978 SC 1202, Smt. Indu Balabore v. Manindra Chandra Bose MANU/SC/0386/1981 : AIR 1982 SC 133, Kalyan Singh v. Choti MANU/SC/0258/1989 : AIR 1990 SC 396, Ram Pyari v. Bhagwanh MANU/SC/0306/1990 : AIR 1990 SC 1742, Veerattalingam MANU/SC/0388/1990 : AIR 1990 SC

2201, Kasibhai v. Parwatibai MANU/SC/0799/1995 : 1995 (6) SCC 213, Rabindranath Mukherjee v. Panchanan Benarji MANU/SC/0322/1995 : AIR 1995 SC 1684, PPK Gopalan Nambiar MANU/SC/0354/1995 : AIR 1995 SC 1852, Daulat Ram v. Sodha MANU/SC/0969/2004 : AIR 2005 SC 233, S.Sundaresara pai v. Sumangala T.Pai MANU/SC/0750/2001 : AIR 2002 SC 317, Janki Narayan Bhoir v. Narayan Namdeo Kadam MANU/SC/1155/2002 : AIR 2003 SC 761 : (1)Supreme-297, Umadevi Nambiar v. T C Sridhan MANU/SC/1026/2003 : 2004(2)SCC 321, Daulat Ram v. Sodha MANU/SC/0969/2004 : AIR 2005 SC 233, Sridevi v. Jayaraja Shetty MANU/SC/0065/2005 : AIR 2005 SC 780, Pentakota Satyanarayana v. Pentakota Seetharatnam MANU/SC/0819/2005 : AIR 2005 SC 4362, Gurdev Kaur v. Kaki MANU/SC/2699/2006 : AIR 2006 SC 1975, Gopal Swaroop v. Krishna Murthy MANU/SC/0988/2010 : AIR 2010(14)SCC 266, Mathai Samuel(supra).

15(b)(xi). Coming to the proof of WILL (testamentary instrument execution which includes attestation and its proof). Apart from the other expressions supra, the Constitutional Bench expression in Shashi Kumar Benarji(supra) held at page-531, para-3 that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act, 1925, which says the testator shall sign or affix his or her mark to the Will or it shall be signed by some other person in the presence and by his direction and the Will shall be attested by two or more witnesses

each of whom has seen the testator signing or affixing his or her mark to the Will or as seen some other person signed the Will in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator and Section 68 of the Indian Evidence Act mandates in the case of denial or not of execution, examination of one attesting witness atleast in proof of the Will whether registered or not. In the absence of suspicious circumstances, it is suffice to prove testamentary capacity and due execution with attestation and where there are suspicious circumstances, the onus is heavy on the propounder to dispel the same for the court acceptance as genuine and last Will and testament. Attestation of a Will means testifying the signature of the executant. It is equally important that for a Will to be valid and enforceable shall be attested by two or more witnesses, each of whom has seen testator sign or affix his mark to the Will or the testator should personally acknowledge his signature or affixture of his mark to the Will in the presence of the attestors and without that acknowledgement, it cannot be inferred and further each of the witnesses has signed said Will in presence of testator and said provision is not a mere formality, but mandatory. Proof of attestation of the Will is also mandatory - Dr. M.Ratna v. Kottaboina Navaneetham MANU/AP/0026/1994 : AIR 1994 AP 96, Yumnam O.T.I. Devi (supra) & A. Poline D'Souza v. John D'Souza MANU/SC/7718/2007 : 2007(7)SCC 225. However, Court cannot disregard evidence of attending circumstances on record if those must satisfy itself as to compliance on the totality, like giving evidence by one attesting witness and there is no dispute about

presence of other attesting witness at the time of execution of the Will from the other contesting party from the other attester's name finds place in the Will even the witness examined did not speak by mere non-recollection of said fact from lapse of time to the date of evidence from date of document and its execution vide decision *M.B. Ramesh v. K.M. Veerajeurs* MANU/SC/0462/2013 : 2013(7) SCC 490. Such circumstances are in fact rare and as such, the attesting witness examined otherwise must also speak the presence and attestation of other witness also as part of proof. Thus, in view of Section 63(1)(c) of the Indian Succession Act r/w Sections 68 & 71 of the Indian Evidence Act, it is sufficient even one attester is examined, but that attester should speak not only about the testator's signature or affixing his mark to the Will or somebody else signing it in his presence and by his direction or that he had attested the Will after taking acknowledgement from the testator of the signature or mark, but he must also should speak that each of the witnesses had signed the Will in the presence of the testator. It is irrespective of non-denial of its execution, one attesting witness at least as a concession out of minimum two persons to attest as required, must be called upon to prove the deed, if there be even one alive and subject to the process of the Court. But what is significant is that said attesting witness examined must be able to speak to the attestation by the other attester also. Section 71 Evidence Act has no application if the attesting witness only one examined (of the two or more attestors) has failed to prove the execution of the Will and the other attesting witness/s even available not summoned and examined. It is clear from the language of Section

71 Evidence Act, that if an attesting witness examined denies or does not recollect execution of the document, its execution, may be proved by other evidence (under Sections 47 & 67 and or Sections 45 r/w.51 and or Section 73 of the Evidence Act). Sections 71 when cannot be resorted to from said one attesting witness fails to prove the will and the other attesting witness if alive and available without his examination to prove by other evidence, it cannot be said the execution is proved as per law as Section 71 of the Evidence Act is only a permissive provision and enabling section to permit a party to lead other evidence only in certain circumstances-which are the above as it is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and such impossibility cannot be let down without any other means of proving due execution by other evidence as well. Section 68 of the Evidence Act is not merely an enabling section as it lays down the necessary requirements, which the Court has to observe before holding that a document is proved. Thus, Section 71 of the Evidence Act cannot be read so as to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act - to liberally allow him, at his choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the Court concerned and confer a premium upon his omission or lapse, to enable him to give a go-bye to the mandate of law relating to the proof of execution of a Will. Where the attesting witness called upon to prove execution, is not in a position to prove the attestation of the Will by second witness, the evidence of the witness falls short of

the mandatory requirements of Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act and Section 71 of the Evidence Act can only be invoked in such case and proved no other attesting witness available including by attempt to summon for securing- See - Janaki Narayan Bhogir(supra), Karri Nukaraju v. Putra Venkatrao MANU/AP/0060/1974 : AIR 1974 AP 13 & Babu Singh v. Ram Shahiaram singh MANU/SC/2456/2008 : 2008(14) SCC 754. Further, Section 69 of the Evidence Act, applies in the absence of attesting witness and only when party moves the Court for summons under Order 16 Rule 10 CPC and the witness fails to obey the summons to prove the Will in the manner prescribed by Section 68 of the Evidence Act - vide Babu Singh(supra). If the attesting witnesses are dead their signature can be proved by other evidence of person acquainted with or opinion from comparison with signature/handwriting/thumb impression as the case may be (under Section 47 & 67 and or Section 45 r/w.51 and or Section 73 of the Indian Evidence Act. No doubt, it was held by the division bench of our high Court in Alluri JS Lakshmi v. Kopparthi R Rao MANU/AP/0051/1994 : 1994(1)ALT 217(DB) that execution of Will need not be proved when it is admitted by other side and when contest is only on legal aspects as to validity of bequeathing certain properties covered by the will. For that conclusion mainly relied upon Section 58 of the Evidence Act. In fact, without attestation when execution is not complete and without proof of execution by attestation, the disputed contents of it cannot be looked into as also laid down by the Apex Court in catena of expressions supra. Besides that, in the case on hand

there is no admission of execution and attestation and also contents since all are denied and disputed. It is laid down even by the later expression of the Apex Court that without attestation, execution of the Will is not valid-vide decision *Kahibai v. Parwatibai* MANU/SC/0799/1995 : 1995(6)SCC 213. Where genuineness of the Will is questioned, it is the duty to prove the Will is the product of free mind of the testator and it is the duty of the propounder to dispel the surrounding suspicious circumstances, if any - vide decisions in *Savithri v. Karthyayani Amma* MANU/SC/8061/2007 : (2007) 11 SCC 621; *Gopala Krishna Pillai v. Meenakshi Ayei* MANU/SC/0268/1966 : AIR 1967 SC 155, *Venkatachala Iyengar* and other decisions referred in the previous paras(supra).

15(c). Coming to controversy as to in the absence of proof of due execution and attestation, some of the contents of the document if not in dispute whether can be looked for collateral purpose; the law in this regard culled out to settle the controversy is the following:

15(c)(i). Regarding the written authority by husband to wife to adopt a child by her after his life time under uncodified Hindu law, it was observed in Para 453 of Mulla of page 780 that the authority must be in writing and registered, unless it is given under a Will vide decision *Mottasiddilal V. Kundanlal* 1906 (28) All. 377 and *Ravath V. Beni Bahadur* AIR 1926 PC 1927 and if the authority is given under a Will, it must be executed in accordance with the formalities required by Section 63 of the Indian Succession Act. It is to say collateral purpose is not recognised or considered in the above.

15(c)(ii). In *Shib Chandra v. Gour Chandra Paul* MANU/WB/0453/1922 : AIR 1922 Calcutta 160 - it was at Page 162, referring to Section 68 of the Indian Evidence Act, on admissibility for a collateral purpose or not of a compulsory attestable document even denied execution and attestation, not proved under Section 68 of the Evidence Act, it was held that Section 68 of the Evidence Act applies not only to cases where document is admitted to be enforced to prove the legal right or relation it creates, but in case where such document is sought to be proved for a collateral purpose. The view is also supported by the impetrative wording of Section 68, which does not permit the admissibility of the instrument as evidence for any purpose, what so ever unless and until, it is proved in strict compliance with the provisions of the Section. The rigor of the English Law, on which the present Section is founded, has been to a certain extent lessened by the proviso as contained in Section 70 of the Evidence Act. The enactment of this proviso clearly indicates that the Indian legislature intended to provide only one exception to this inflexible rule and no other. Later also in *Awadhu Ram v. Mahbub Khan* AIR 1924 Oudh 255, the division bench of the Oudh High Court held at page 259 referring to Section 68 of the Evidence Act that, there is no distinction between documents which are the basis of a suit and those whose production is required for a collateral purpose, so far as their admissibility in evidence is in question. The direction in Section 68 of the Evidence Act is mandatory and draws no such distinction. In *Pt. Shyam Lal v. Lakshmi Narain and others* MANU/UP/0105/1938 : AIR 1939 All 269 (DB), it was held by the Allahabad High Court

that Section 68 of the Evidence Act does not apply to a document, which is merely to be proved for admission of contentions in it. Further in *Mahadio Prasad v. Gulam Mohd.* MANU/UP/0356/1946 : AIR 1947 Alahabad 161 (DB) referring to Section 68 of the Evidence Act, it was held by the division bench of the Allahabad High Court that Section 68, applies only if document is relied upon as requiring attestation-for example a Will. Non-compliance with the provisions of Section 68 of the Evidence Act, however, does not prevent the document from being used in evidence under Section 72 for any other or collateral purpose and to that conclusion they placed reliance upon the earlier expressions of the Allahabad High Court of 1915, 1918 and *Pt. Shyam Lal*(supra) of 1939, in saying use of the document for collateral purpose is not a bar, from the bar under Section 68 of the Evidence Act; as Section 68 applies only if a document is relied upon as one requiring attestation to comply. However, in the later judgment reported in *Paranru Radhakrishnan v. Bharathan* MANU/KE/0030/1990 : AIR 1990 Kerala 146, by referring Section 68 and 69 of the Evidence Act and also referring to the above expressions of the Calcutta, Ough and Allahabad High Courts, the Kerala High Court held that from reading of Section 68 of the Evidence Act, it is evident that a document which is required by law to be attested, shall not be used at all as evidence, until one of the attesting witnesses at least has been examined to prove its execution. The imperative wording of Section 68 of the Evidence Act makes it clear that it does not permit the utilisation of a document, which is required by law to be attested as evidence until it is proved strictly in

accordance with the provisions of the Section. From a reading of Section 68 of the Evidence Act and its proviso, it is not possible to hold that the rigor of the section can be watered down in case of a Will, which is required by law be attested to prove it to use the same in evidence even for collateral purposes. Thus, where the production of Will was for the purpose of establishing right in the property and not relationship between the parties and the testator, strict compliance of Section 68 of the Evidence Act is mandatory and without adhering to the provisions, it cannot be used even for any collateral purpose.

15(c)(iii). It is in this background, it is important to refer the recommendations of the Law Commission of India, suggesting an amendment to be made to the Indian Evidence Act for various sections covered by 185th report and though at pages 185.179 to 185.183, it was dealt with the above propositions also in suggesting amendment for admissibility to the collateral purpose, without need of proving the due execution and attestation for admissibility to the main purpose. It speaks from the 69th report, among the amendments suggested include amendments to Section 68 of the Evidence Act and under Sections 57, 58 and 63 of the Indian Succession Act and Sections 59 and 123 of the Transfer of Properties Act. The Law Commission 69th report recommendations also stated the opinion of Sarkar, the Author on the Evidence Act that Section 68 of the Evidence Act should not apply, if the Will is more than 30 years old under Section 90 of the Evidence Act or was not produced in spite of notice to produce under the Evidence Act; which proposals are broadly in conformity with the English Law as it stands after the UK

Evidence Act, 1938.....which accept even in case of Wills for other situations where witness is kept out of way..... Sarkar on Evidence (15th edition-1999) at page 1124, Wigmore on Evidence at Para 1288, speak that the theory that parties must be deemed to have agreed that the attester will be a person, who should speak about the circumstances of the execution, is not correct and there is no such agreement can be implied, particularly, when attestation is required by law. As per Sarkar, Page 1124 the attester is in practice, not usually a person who knows anything about the circumstances preceding the document execution and also on the aspect, the words shall not be 'used in evidence' mean that the document can be used for collateral purposes. Several Jurists in America relaxed the rule for the purpose of collateral or incidental use (Wigmore Section 129 quoted by Sarkar Page 1129) as relaxed the rule in admission of a mortgage bond in MANU/UP/0399/1915 : AIR 1939 Allahabad 366, AIR 1915 Allahabad 254. The Law Commission thus proposed that the inadmissibility must be confined to the testamentary disposition and not for collateral purpose and recommended that Section 68 of the Evidence Act must be confined only to Wills and required to be re-drafted and the exceptions added and referred to in the 69th report required. It clearly speaks even from the Law Commission 69th Report, so far as a Will is concerned the admissibility cannot be without examining at least one of the attestors in proof of due execution even to read any of the contents that what practically laid down by the Kerala High Court referring to the earlier expressions of Allahabad, Haryana and Calcutta High Courts. The Apex Court in

Kashibai and another v. Parwatibai MANU/SC/0799/1995 : 1995 (6) SCC 213 held at paras 10 and 11 that Section 68 of the Indian Evidence Act shows that the attestation and execution are the two different acts one following the other. There can be no valid execution of a document which is required by law to be attested without the proof of its due attestation and if due attestation is also not proved; the fact of execution of the Will is of no avail-See also several expressions referred and discussed in the previous paras supra and in particular of the Karri Nukaraju, Dr. M. Ratna & Janki Narayan Bhoir- with reference to Section 3 of the Transfer of Property Act, Sections 68-71 of the Indian Evidence Act & Section 63 of the Succession Act, with regard to the execution of unprivileged Wills the word attested has been defined as in Section 3 of the Transfer of Property Act. In the case on hand, as found by the trial Court, none of the witness to the Will had deposed that the deceased-attestor had signed the Will before them and that they had attested it and in the absence of such evidence, it is difficult to accept that the execution of the Will was proved in accordance with law, but held that Will has not been proved. In Babu Singh(supra) held referring to Section 68 of the Evidence Act, Section 63 of the Indian Succession Act and Section 3 of the Transfer of Property Act that to prove due execution of Will, at least one attesting witness required to be examined as attestor must be in conformity with Section 3 of the Transfer of Property Act and with the requirement of Section 63 of the Indian Succession Act, that must be complied with.

15(d). Coming to decide an entry or entries in an account book whether can be admitted to read with relevancy within the meaning of Sections 11 or 32 or 13 or 34 of the Evidence Act concerned, (it is in addition to the meaning and scope of Sections 11 or 32 or 13 or 34 of the Evidence Act referred supra, though in a different context on contents of a will can be read for collateral purpose, even not proved as contemplated by law); the legal position on the subject is the following:

"15(d)(i). The Division Bench of Madras High Court in AIRLSVLS Chettiyar v. RSMVR Dorai Singa MANU/TN/0390/1938 : AIR 1940 Madras 273 it was held at page 278 that, statement not satisfying the considerations laid down in Section 32 of the Evidence Act cannot be admitted, even under Section 11 of the Evidence Act, merely because it may be probablises relevant fact; as Section 11 must be read subject to the other provisions of the Act. It is in saying what is not admissible under Section 32 cannot be admitted under Section 11 of the Evidence Act and Section 11 of the Evidence Act no way helps independently to admit what is not admissible under Section 32 of the Evidence Act.

15(d)(ii). In re Daddapaneni Narayanappa MANU/TN/0703/1910 : 1910 Indian Cases page-286 (Madras), it was held that recital in a document of neighboring land, referring one of its boundary as suit land and it belongs to a particular person, for the person to rely on it, is not legal evidence and the same is not even admissible under Section 32(2) of the Evidence Act. The decision while saying neighboring owners document referring boundary recital of suit land not legal evidence to the

lis, held therefrom as not even admissible under Section 32(2) of the Evidence Act. It no way says the recital won't come under Section 32(2) of the Evidence Act.

15(d)(iii). It was also held in *Karupaanna Konar v. Rangaswami Konar* MANU/TN/0400/1927 : AIR 1928-Madras-105(2) at page-106 that, a mere statement of boundary cannot be classed with any of the verbs in Section 13 of the Evidence Act of created, modified, recognised, asserted or denied and is therefore not admissible; the same is not even admissible under Section 32(3) of the Evidence Act as it is a statement and not the document containing the statement that must be against the proprietary interest of the person making it. It is to say, if it is the statement in a document it comes within the purview of Section 13 & 32(3) of the Evidence Act

15(d)(iv). The other decision in *Siripalli Venkata Rayagopala Raju v. Hota Narsaiah* Madras High Court Volume 26 Indian cases page 747 of the year 1914 D.B., it was held that a document mentioned as sale deed executed by widow of the family asserting the property belongs to their husband were admissible under Section 13(1) of the Evidence Act as transaction so also written statement filed by them in suits which they are parties and in which they had made recitals. Whereas a document in which there is a recital between third persons in describing the boundary of property sold, as the suit property as that of particular family is not admissible under Section 13 of the Evidence Act as a transaction or even under Section 32 of the Evidence Act as an admission against interest.

15(d)(v). In *Karpanna Kumar (supra)*, it was held further in dealing with Section 32 and 13 of the Evidence Act that under Section 32(3), it is the statement and not the document containing the statement which must be against the proprietary person making of interest and under Section 13 of mere statement of boundary cannot be classed with any of the verbs in Section 13 created, modified, recognized, ascertained or denied as is therefore not admissible under Section 13 (a) of the Evidence Act.

15(d)(vi). In fact as laid down by the Madras High Court later to the above in the year, 1956 in *Rangayyan v. Inasimutthu (supra)*, recitals of the boundaries in a document inter-parties is admissible as a joint statement of the parties executed it to act as admission, where as recitals of a document between a party and stranger is relevant against the party as an admission but is not admissible in his favour unless the fact recited is deposed by executants of the document in Court to act as a corroborative evidence under Section 157 of the Evidence Act or to contradict under Sections 145 & 155(3) of the Evidence Act; whereas recitals as to boundaries in the document between third parties, it is not ordinarily admissible to prove possession or title as against a person, who is not party to the document, but for at best to corroborate or to contract. The probative value to be attached to such recitals in the documents even admitted in evidence is depending upon the facts and circumstances of each case right from "0" to clinching evidence as the case may be from material on record of the respective cases.

15(d)(vii). The other decision in *Jayan v. Jayala Laxman* MANU/AP/0055/2008 : 2008 (3) ALD 657 DS, which is a division bench expression of this Court of the year, 2008 that placed reliance by both sides regarding the scope of Section 32(7) read with 13(1) of the Evidence Act, holding that a deed executed by deceased Karta of joint family, the recitals can only be as between parties as to continuous and those claim under them, but by itself is not sufficient evidence to establish that suit property is self acquired property of deceased and admissibility of such recital under Section 32(7) read with 13(a) of the Evidence Act does not affect. At Para 28 to 33 of the judgment, it was observed that the recitals in the document in question in admissible under Section 32(7) and 13(a) of the Evidence Act, executed by late Muni Subbaiah by itself is not sufficient evidence to establish that suit property is self acquired. Recitals in deeds can only be the evidence as between parties to the continuous and those who claim under them at any rate a recital can be assertion of fact contained by the recital. Some other evidence must be available to substantiate the same. It is true that where alienation is questioned allowing after transaction took place, a recital in the document which is constrained with the probable and the circumstances of the case assumes greater importance, since the original parties to the transaction those who can have given efforts at the relevant point of time being grown old was passed away. However, such recital by itself does not constitute sufficient evidence to establish the extents of a fact.

15(d)(viii). The controversy is in fact set at rest by the Apex Court in the year, 2003 in its expression in *RVEV Gounder v. A.V.*

and V.P. Temple (supra), holding that Section 34 of the Evidence Act declares as relevant, entries in books of account regularly kept in the course of business, whenever they refer to a matter into which the Court has to enquire. When such entries are shown to have been made in the hands of a maker who is dead, the applicability of Section 32(2) of the Evidence Act is attracted; and according to which statement made by the dead person in the ordinary course of business and in particular when it constrains of entry or memorandum made by him in books kept in the ordinary course of business is out way is by itself relevant. The maker of the entry is not obviously available to depose in corroboration of the entry. In a given case, depending on the facts and circumstances brought on record, the Court of facts may still refuse to act on the entry in the absence of some corroboration. Therefore, this expression in RVEV Gounder supra crystalised that the relevancy of book of accounts under Section 34 of the Act no way lost its value for admissibility and relevancy from non-examination of the maker of the entries for such person when died.

15(d)(ix). Here from the above, in so far as Ex. A2 entry in the Ex. A1 account book maintained by the late husband of PW1 that was deposed and proved through PW1 and with reference to the same cross examination was done is admissible under Sections 11 read with 32(2&3) and also under Sections 13 & 34 of the Evidence Act, then to decide probative value of the entry on how far proved and disproved with reference to the evidence of PW1 and DW1 and how far to act upon it, with or without corroboration, relating to the joint purchase by payment of an

amount of Rs. 500/- to Ch. Lakshmi Narasimha Rao (defendant) for the purchase of plaint schedule Item-1 house site of 1200 sq yards at Mamillagudem in Khammam town, leave about the recitals in the Ex. A.9 cannot be looked into in this regard for the will is not proved as contemplated by law from what is discussed supra."

15(e). Whether there is any approbate and reprobate or inconsistent pleas taken by plaintiffs regarding plaint schedule Item-1 house site concerned; it is also the well settled principle of law that to be kept in mind that, a plaintiff can at best take alternative pleas, but cannot proceed on inconsistent pleas and even any pleas taken inconsistent to one another, he got the doctrine of election of one of the pleas thereby the other inconsistent plea being taken waived, for not entitled to approbate and reprobate. However, so far as defendant concerned, he can take any number of pleas to non-suit the plaintiff any in that course one plea may be inconsistent to the other, however, where he makes a counter claim, he is at par with plaintiff so far as the counter claim concerned and as such he cannot be permitted to make out a case inconsistent to his plea-vide decisions Balder Singh B.Manohar Singh MANU/SC/3519/2006 : AIR 2006 SC 2832, G.S. Mahalakshmi v. Shah Ranchhoddas MANU/SC/0466/1969 : AIR 1970 SC 2025 & Firm Srinivas Ram v. Mahabir Prasad MANU/SC/0021/1951 : AIR 1951 SC 177. Thus, having claimed the item No. 1 of plaint schedule as only joint property of plaintiffs and defendant, cannot be claimed by plaintiffs as part of joint family property.

15(f). He, who accepts a benefit under a deed or Will or other instrument, must adopt the whole contents of the instrument, must confirm to all its provisions and renounce all rights that are inconsistent with it. Election is obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternate rights or claims in cases where there is a clear intention of the person from whom he derives the one, that he should not enjoy both. Every case of election therefore, presupposes plurality of rights, with an intention of the party who has a right to control one or both, that one is substitute for others. The party who is to take has a choice, but he cannot enjoy the benefit of both as laid down in *Streatfield v. Streatfield* and explained by the three judge Bench in *Nagubai Ammal v. B. Shyam Rao* MANU/SC/0089/1956 : AIR 1956 SC 593, para 23 page 602 that the doctrine of election is not however confined to instruments. A person cannot say at a time that a transaction is valid and thereby obtained some advantage, to which he could only be entitled on the footing that it is valid and then turned round and say it is void for the purpose of securing some other advantage, to approbate and reprobate the transaction. In *Halsbury's laws of England Vol.13*, page: 454 para 572, the principle has been described as species of estoppels. The said principle has also been accepted in *C. Bwepathuma v. Velasine S. Kadamboli phaya* 159 MANU/SC/0209/1963 : AIR 1965 SC 241 at para 17&18. The Apex Court further observed in *R.N. Gosain v. Yashpal Dhir* MANU/SC/0078/1993 : AIR 1993 SC 352 as follows: "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election

which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage".

15(g). Coming to the admissions - Admissions are relevant and must be read as a whole and cannot be split up to rely upon a part of statement to the advantage to ignore the other part which is to the disadvantage of same party. The word 'admission' has been defined under Section 17 of the Indian Evidence Act as follows:- "An admission is a statement, oral or documentary or contained in electric form, which suggests any inferences as to any fact in issue or relevance fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned".

15(g)(i). In Wigmore's Evidence, 1095 Ed., Page 1226, the word 'admission' has been defined as follows:- An "Admission" in the correct sense is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence by conceding for the purposes of litigation that the proposition of fact claimed by the opponent is true"

15(g)(ii). Order VIII Rules 3-5 of C.P.C. envisage that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. There is no other provision in C.P.C. imposing such a condition on the plaintiff to deny the

allegations of fact made by the defendants in their written statement.

15(g)(iii). Order XX Rule 6 of C.P.C. envisages passing of decree on admissions to the extent admitted, to put the parties to trial for rest of the lis, if any.

15(g)(iv). Thus, admission means admitting the fact which is asserted by other party. When a party pleads that there is a partition and when the other side disputes the same, it becomes a disputed fact and when it is a disputed fact, the Court has to give a finding on the said disputed fact. Of course, at a subsequent stage, a party cannot be permitted to take a contra stand to the earlier stand taken by said party. However, the admissions can be explained away and retracted. Thus, in placing reliance on admissions, conduct of the parties and all subsequent events have to be conjointly examined and reasonable conclusions basing on the probabilities of the case have to be drawn to decide how far to rely in appreciation of evidence, being relevant and otherwise conclusive.

15(g)(v). It is well laid down in *Karuna Kapali v. M/s. Lalchand PC Trust* MANU/SC/0240/2010 : 2010(3) Scale 569 in dealing with relevancy and importance of pleadings and binding nature on facts admitted need not be proved under Section 58 read with Sec.17 and 21 of the Indian Evidence Act r/w. Order VIII Rules 3-5 CPC and Order XII Rule 6 CPC. See also- *Sajjana Granites v. M.S. Rao* MANU/AP/0147/2002 : 2002(1)-ALT-466(DB) at para 34.

15(g)(vi). In *P.S. Sairam and another v. P.S. Rama Rao Pisey* MANU/SC/0085/2004 : AIR 2004 SC 1619 & *Hardeo Rai v.*

Shakuntala Devi MANU/SC/7540/2008 : AIR 2008 SC 2489 - it was held that an admission made by a person cannot be split up for only part of it can be used against the maker. In fact, the correct meaning of the word 'admission' appears to be when a party in proceedings has made a statement or taken a stand and when the other side has admitted the same as true, the same amounts to admission. Thus, even when a party admits the plea or the stand of a party in earlier proceedings, the same also can be treated as an admission.

15(g)(vii). Further in *Bharat Singh v. Mst. Bhagiradhi* MANU/SC/0362/1965 : AIR 1966 SC 405 at para 7 at Para 19-it was held by the three judge Bench of the Apex Court on admissions and its relevancy that, admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of Sections 17 to 21 of the Indian Evidence Act, though party is not confronted with the statement and in such case the weight to be attached to it is a different matter. It is to say their evidentiary value is very weak and as such those are not conclusive proof of the matters admitted. It was held that, admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting witness u/sec.145 of Indian Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted, while previous statement used to contradict the

witness does not become substantive evidence and merely serves purpose of throwing doubt on the veracity of the witness. Thus, what weight is to be attached to an admission made by a party is a matter different from its use as relevant and admissible evidence.

15(h). Then coming to adverse possession claim, in *Karnataka Board of Wakfs v. Government of India* (2004) 10 SCC 639 it was held that adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is "nec-vi, nec-clam, nec-precario", that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. Physical act of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors, which are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law, but a blended one of fact and law. Therefore, a person who claims adverse possession should show - a) on what date he came into possession, b) what was the nature of possession, c) whether the factum of possession was known to the other party, d) how long his possession is continued and e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour, since he is trying to defeat the rights of the true owner, thus it is for him to clearly plead and establish all facts necessary for adverse possession - vide decisions: *S.M. Karim v. Bibisakina* MANU/SC/0236/1964 : AIR 1964 SC 1254,

Parsinni v. Sukhi MANU/SC/0575/1993 : 1993 (4) SCC 375, D.N. Venkatarayappa v. State of Karnataka MANU/SC/0766/1997 : 1997 (7) SCC 567, Maheshchand Sarma v. Rajkumar Sarma MANU/SC/0231/1996 : 1996(8) SCC 128 and P. Periaswamy v. P. Periathambi MANU/SC/0821/1995 : 1995(6) SCC 523. In Nakkalapu Annapurnamma v. N.N. Kumar 1997(4) ALD 97 DB - it was held that possession obtained through invalid sale by vendee can set up adverse possession against the vendor from that date as said possession is with own right to acquire title by adverse possession after statutory time. However, mere length of possession does not constitute adverse possession in the absence of animus possidendi- See also Maherndra C. Mehta v. Kousalya Co-op Housing Society Ltd. 2001(5) ALT-102, at para-15 in pointing out the distinction between Old Limitation Act, 1908 Articles 136-144 & New Limitation Act, 1963 Articles 64 & 65, in particular Article 144 (old) replaced by Article 65 (new) and with reference to Sections 27 & 28 (new) and by placing reliance upon J. Manikyam v. K. Tatayya 1992 APHN 244, Bhagwathi Pillai v. Savarimuthu AIR 1976 SC 121, Mahavir v. Pural Institute MANU/SC/0763/1995 : 1995(5) SCC 335 & P. Periaswamy (supra). It was also held categorically at paras-19&19A that entries in the revenue records do not confer any title on the person in whose name is entered therein; nor do they extinguish right of the real owner, when the land is shown to be fallow and uncultivated.

15(i). Coming to adverse possession among co-owners, on the doctrine of ouster, possession of one co-owner is possession of all on the basis of joint title of all on the principle that co-

owner in possession would become constructive trustee on behalf of the others not in possession and even mere mutation in name of one among those no way a ground to take plea of adverse possession much less setting up secret hostile animus on his own part in derogation to other's title and or ouster of the right of others therefrom, unless there has been a clear ouster by denying title of other co-owners to their knowledge, vide decisions - Balvanth Singh v. Dowlath Singh MANU/SC/0736/1997 : AIR 1997 SC 2719, Karbalai Begum v. Mohd. Sayeed MANU/SC/0363/1980 : AIR 1981 SC 77, P.Lakshma Reddy v. L.Lakshmi Reddy MANU/SC/0083/1956 : AIR 1957 SC 314, Gaddem Chinna Dodamma v. Goka Pedda Doramma MANU/AP/0262/2005 : 2005 (3)ALD 531=3 ALT 619 and Raghunath pershad v. Janakibai MANU/AP/0607/2005 : 2005 (6)ALD 161. In Tricon partners v. Smt. Mandala Neeraja MANU/AP/1271/2012 : 2013 (2) ALT 268 para 7 it was held that to set up ouster among coparceners as purchaser from one of coparceners as own, their possession should be for 12 years continuous and they cannot count the possession of vendor as their possession. So also the decision of Modadugu Venkata Subbamma v. Kana Marlapudi Rattaiah 2008(6) ALD 2002 that the alienation of joint family property must be for benefit of the estate to bind other coparceners; so also the decisions of Vadla Krishnaiah v. Nalli Narasimha Reddy 1976 (2) APLJ page 16 and Manikyala Rao AIR 1956 SC 470 holding (by referring to Siddeswar Mukharji MANU/SC/0089/1953 : AIR 1953 SC 487, permanayakam MANU/TN/0197/1952 : AIR 1952 Mad.419 and Achayya v. Venkata Subba Rao AIR 1957 AP page 8) that the

purchaser of undivided share of co-parceners cannot acquire any interest in specific item of properties and claim to be put in possession that any definite piece of the family property, but for acquires on equity to step into the alienor's shoes and work out his rights by partition as the tenant in common, he cannot even in joint possession with other co-parceners and thereby cannot even claim protection under Section 53-A of the T.P. Act. Thus, so far as item No. 7 of plaint schedule, there is no adverse possession, but for plaint schedule item No. 1 even it is taken proved of joint property, against plaintiffs by defendant.

15(j). Regarding presumption of joint family property, sufficiency of nucleus, jointness in a family, disruption and burden of Proof:

"15(j)(i). In Appasahab Peera Chamdgate v. Devendra Peerappa Chamdgate MANU/SC/8597/2006 : 2007(1) SCC-521 - it was held at Paras 12-17 - referring to Shrinivas KK v. Narayn DK (three judge Bench), MANU/SC/0126/1954 : AIR 1954 SC 379 Mst. Rukhmabai (three judge Bench-supra), Atchuthan Nair v. Chinnamu Amma MANU/SC/0361/1965 : AIR 1966 SC 411, Bhagwath P. Sulake v. Digambar Gopal Sulake MANU/SC/0267/1985 : AIR 1986 SC 79 and Surendrakumar v. phoolchand MANU/SC/0307/1996 : 1996(2) SCC 491 : AIR 1996 SC 1148 that, the initial burden is on plaintiffs to show that the property is joint family property and then it shifts on the defendants to show that the property claimed by them was not purchased from out of the joint family nucleus and it was purchased independent of them. On facts held the defendants failed to establish any sufficient funds out of which they could

acquire any of those claimed as own and thereby held all the suit properties are joint family partiable properties.

15(j)(ii). In *Mst. Rukhmabai*(supra), it was held in para-5 that, there can be division in status among the members of a joint family by definement of shares which is technically called division in status or an actual division among them by allotment of specific property to each one of them which is described as division by metes and bounds. A member need not receive any share in the joint estate but may renounce his interest therein; his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members' vis-à-vis the family property. A division in status can be affected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of a joint family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which said property could have been acquired, the burden shifts on the members of the family setting up the claim that it is his personal property to establish that said property has been acquired without any assistance from the joint family property.

15(j)(iii). In *Mudigowda Gowdappa Sankh v. Ramachandra Revgowda Sankh* MANU/SC/0289/1969 : AIR 1969 SC 1076 also the Supreme Court observed thus: The law on this aspect of the case is well settled, of course, there is a presumption that there is a Hindu joint Family; however, there is no presumption that Hindu family merely because it is joint it possesses any joint property. The burden of proving that any particular property is joint family property is therefore, in the first instance upon the person who claims it as Coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be the joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown; that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate-see also *Rajendra Nath Majhi v. Tustu Charan Das*. AIR 1969 Calcutta 105

15(j)(iv). In *Jamunabai v. Saradhabai* MANU/AP/0618/1998 : 1998(4) ALD 655 it was held at para-17 relying upon *Mudigowda Gowdappa Sankh* (supra) and *Appalaswamy v. Suryanarayana Murthy* MANU/PR/0051/1947 : AIR 1947 PC 189, that there is no presumption that property standing in the name of one of the members of the joint family is the self-acquired property of him, when evidence is showing existence of

nucleus to acquire the property in the absence of proof of self-acquired property to hold as part of joint family property.

15(j)(v). In *Kakumani Subbarao v. Venkateshwarlu* MANU/AP/0466/2012 : 2012(5) ALD 161 it was held that in the suit for partition filed by the plaintiff claiming some of the items as self-acquired and the other items that are partible, the defendant's plea that those also part of the joint family properties, where plaintiff and defendant living together till date of suit, initial burden is on the defendants to show joint family possessed sufficient nucleus with which said property could have been acquired; and if it is shown of sufficient nucleus burden would immediately shift on to the plaintiff to show that the property was not joint family property, but his self-acquired property; and in the absence of clinching evidence from his side very establishment of sufficient nucleus for joint family property would attract presumption that the property is joint family property as mere recitals in the sale deed stands in the name of the plaintiff does not draw a presumption of plaintiff is owner of the properties. The admissions in the suit in pleadings and evidence by a party can be relied upon by the other party to the suit in proof of respective claims.

15(j)(vi). It was also held in the division bench expression of this Court in the year, 2008 in *Jayan v. Jayala Laxman* MANU/AP/0055/2008 : 2008 (3) ALD 657 DB at Para 21 that, it is the settled proposition that, property cannot be presumed to be joint family property from existence of joint family as burden of proof. The property as the joint family property always lies on the person who so asserts, however, once he proves that the family

possessed sufficient nucleus and with aid of which the suit properties could be acquired, then presumption has to be drawn that the properties are joint and consequently the burden of proof shifts on the person claiming to be his self acquired.

15(j)(vii). In *P. Subbalakshmi v. P. Ramya* MANU/AP/0413/2010 : 2011(1) ALT 256 - it was held in the partition suit regarding burden of proof on the claim of self-acquisition by one of the members of the joint family with coparcenary, that even while being a coparcenary in a joint family it was permissible for the defendant to acquire properties by himself and oppose any steps for partition thereof, that could have been possible if only he has established through cogent evidence that he is possessed of adequate means and had necessary funds at his disposal to purchase the properties.

15(j)(viii). In *K.V. Narayanaswami Iyer v. K.V. Ramakrishna Iyer* MANU/SC/0307/1964 : AIR 1965 SC 289 also it was held with reference to the presumption that, properties in the name of any member of the family are of with the family funds and that such property would constitute and form part of the joint family property, if it is shown that the joint family has sufficient nucleus. See also - *Pabbathi Anjaneyulu v. Pabbathi N.Rathnamaiah Chetty* MANU/AP/0281/2005 : 2005 (4) ALD 291; *D.S. Lakshmaiah v. L. Balasubramanyam* MANU/SC/0639/2003 : (2003) 10 SCC 310; *Srinivas Krishnarao Kango v. Narayan Devji Kango* AIR 1954 SC 397(1) and *Mst. Rukhmabai* (supra).

15(j)(ix). In *Kasaram Jayamma v. Jajala Lakshamma* MANU/AP/0055/2008 : 2008(3) ALD 657 DB also it was held

that, once it is shown property is joint, the presumption to be drawn is that other acquisitions are also joint and the burden is on the person claiming to be self-acquired, so to prove.

15(j)(x). In *Nakkarapu Annapurnamma*(supra) it was held that, though there is no presumption that a family because it is joint possessed joint family property and thereby the person alleging the property to be joint has to establish that family possessed of some property with the income of which the property could have been acquired, which is a rebuttable presumption of fact. But where it is established or admitted that family possessed joint property which form its nature and relative value may form sufficient nucleus from which the property in question may have been acquired, the presumption arises that it is the joint family property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family and to that proposition placed reliance upon the expression of the Apex Court in *Surendrakumar* (supra).

15(j)(xi). In *Sher Singh v. Gamdoor Singh* MANU/SC/0306/1997 : AIR 1997 SC 1333 - it was held at para- 5 that, once existence of the joint family is not in dispute, necessarily the property held by the family assumed the character of a coparcenary property and every member of the family would be entitled by birth to a share in the coparcenary property unless any one of the coparceners pleads by separate pleadings and proves that some of the properties or all the properties are his self-acquired properties and could not be blended in the coparcenary property.

15(j)(xii). In Appasahab Peera Chamdgade (supra) at Para 15 referring to Bhagwath P.Sulake (supra) it was specifically held that, the character of any joint family property does not change with the severance in status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act, it is not open to any member of the joint family to convert any joint family property into his personal property.

15(j)(xiii). In Shankara Rao Daiji Saheb Shinde v. Vithalrao Ganpathro Shinde MANU/SC/0495/1989 : AIR 1989 SC 879 - it was observed that, there is a presumption of jointness in a family governed by Hindu Mitakshara Law and that the initial burden lies on the party who alleges partition that the members of HUF had separated to prove the same, to support his claim of disruption in the joint Status-see also Sital Singh v. Ram Prasad Singh MANU/BH/0119/1957 : AIR 1957 Patna 398(DB).

15(j)(xiv). In Awadh Ram Singh v. Mahaboob Khan AIR 1924 Oudh 255 - it was held that the burden is on the person to prove separation and even mutation of the joint family property in favour of individual members of the family, unsupported by other circumstances of division, do not raise a presumption of separation.

15(j)(xv). In Maherndra C. Mehta (supra) it was also held categorically at paras-19&19A that entries in the revenue records do not confer any title on the person in whose name is entered therein; nor do they extinguish right of the real owner, when the land is shown to be fallow and uncultivated.

15(j)(xvi). The Allahabad High Court clarified in Ram Gopal v. Smt. Maya Devi MANU/UP/0031/1978 : AIR 1978 Allahabad 119 - that it would not be possible always to establish the date of ancient partition, however, the execution of sale deed by the members of the family together with recitals of partition would be decisive to establish whether partition had not been effected or otherwise.

15(j)(xvii). Further in Bharat Singh v. Mst. Bhagiradhi MANU/SC/0362/1965 : AIR 1966 SC 405 Para 7 at Para 7, it was held by the three judge Bench of the Apex Court that, there is a strong presumption in favour of the Hindu brothers constituting a joint family. It is for the person alleging severance of the joint family to establish it. The mere fact that mutation entry made in favour of widow of one of the three brothers indicating share of each to be 1/3rd by itself can be no evidence of severance of joint family or partition.

15(j)(xviii). In Ratnam Chettiar v. SMK Chettiar MANU/SC/0540/1975 : AIR 1976 SC 1 - it was held that where partition deed executed of the partition effected between members of the Hindu Undivided Family by their own volition, it cannot be reopened unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence and in such a case, the Court should require a strict proof of facts because an act inter-vivos cannot be lightly set aside. Even some of the family members are minors if it is done in good faith keeping the interest of the minors and bona fide, unless it is proved to be unjust and unfair and detrimental to the interest of

such minors to reopen. As it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

15(j)(xix). In *Bishnudeo v. Seogeni Rai* MANU/SC/0059/1951 : AIR 1951 SC 280 - it was held of the well established principle that a minor can sue for partition and obtain a decree if his next friend can show that it is for the minor's benefit. It is also beyond dispute that an adult coparcener can enforce a partition by suit even when there are minors. Even without a suit, there can be a partition between members of the joint family when one of the members is a minor. In the case such lastly mentioned partitions, where a minor can never be able to consent to the same in law, if a minor on attaining majority is able to show that the division was unfair and unjust the Court will certainly set it aside.

15(k)(i). On the separate business of coparceners, when constitutes family business and when not concerned; in *G.Narayanaraju v. G. Chamaraju* MANU/SC/0113/1968 : AIR 1968 SC 1276 -it was held by the Apex Court(three judge Bench) referring to *Chattanatha Karayalar v. Ramachandra Iyer* MANU/SC/0050/1955 : AIR 1955 SC 799 and *Bhurumal v. Jagannadh* AIR 1942 PC 13 that, there is no presumption under Hindu law that a business standing in the name of any member of the joint family is a joint family business unless it could be shown that the business of the coparcener grow up with the assistance of the joint family property or joint family funds or

that the earnings of the business were blended with the joint family estate, the business remains free and separate.

15(k)(ii). Separate acquisitions by coparceners when constitutes family property and when not concerned; in *Madanlal v. Yoga Bai* MANU/SC/0161/2003 : AIR 2003 SC 1880 - it was held by the Apex Court, confirming the findings of the Andhra Pradesh High Court's expression in *Poornabai v. Ranchhoddas* MANU/AP/0042/1992 : AIR 1992 AP 270 DB (of nature of joint family property does not change merely because coparceners live separately and in the absence of proof by filing sale deeds and examination of witnesses of purchase with self earnings to support the plea of purchased from own earnings of self business income as self-acquired property, the properties be held as joint family properties, from the business in different names is the family business and the subsequent acquisitions are made out from out of the profits and earnings of the said business with the joint efforts of the father and sons that constitutes joint family properties amenable for partition), that "it is sought to be established that they have been running their business separately under different partnerships. We feel that no such inference can be drawn. Mere family carries on a number of business, it is quite often that it is carried out under different names and styles and often constitutes different companies are partnerships for better handling of business or to keep it manageable or for various other reasons. It is no proof of separation nor are the letters which are sought to be relied upon written to the income tax authorities and the assessment orders passed by the income tax authorities. Therefore, once the family

settlement before the suit for partition was filed is not accepted by means of a finding of fact recorded by the High Court, the case of the defendant falls through."

15(l). On the doctrine of blending, it was held in G.Narayanaraju (supra) that, even property originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims up on it. Such intention can be discovered only from the words or acts and conduct.

FAILURE TO RAISE A PROMPT AND TIMELY OBJECTION AMOUNTS TO WAIVER OF THE NECESSITY FOR INSISTING ON FORMAL PROOF OF A DOCUMENT

Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Another reported in [(2003) 8 SCC 752] to which one of us, Bhan, J., was a party vide para 20: "20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the

admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and

secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

To the same effect is the judgment of the Privy Council in the case of *Gopal Das & Anr. v. Sri Thakurji & Ors.* reported in [AIR 1943 PC 83], in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in *Sarkar on Evidence*, 15th Edition, page 1084, it has been stated that where copies of the documents are admitted without objection in the trial Court, no objection to their admissibility can be taken afterwards in the court of appeal. When a party gives in evidence

a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage.

Court in Smt. Gangabai v. Smt. Chhabubai (AIR 1982 SC 20) and Ishwar Dass Jain (dead) thr.Lrs. v. Sohan Lal (dead) by Lrs.(AIR 2000 SC 426) with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

It is impermissible for the Defendant to lead oral evidence which contradicts what is stated in the documents which admittedly were executed by the Defendant. Reliance is placed on the decisions in Roop Kumar v. Mohan Thedani AIR 2003 SC 2418; Gurdial Singh v. Raj Kumar Aneja (2002) 2 SCC 445

**PRESUMPTION OF OLD DOCUMENTS UNDER SECTION 90 –
DISCRETION OF COURT TO ACCEPT IT SHALL BE
EXCERCISED WITH REASONS**

Sri Lakni Baruan And Others vs Sri Padma Kanta Kalita & Ors
1996 AIR 1253, JT 1996 (3) 268

Section 90 of the Evidence Act is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the Court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons.

**WHEN SOURCE OF TITLE IS NOT DISCLOSED - MERE
 STATEMENT WITHOUT PROOF OF DOCUMENT AS TO
 SOURCE OF TITLE IS NOT RELEVANT**

Prabhakar Adsule vs State Of M.P. & Anr 2004 AIR 3557 = 2004 (11) SCC 249 In the plaint the source of Somaji's title was not disclosed and it was merely stated that he was owner of the disputed land and the same was coming in his possession since 1918. In his statement in Court, the plaintiff came out with a case that the land had been given by way of grant. However, the plaintiff did not lead any kind of evidence to prove the factum of

grant. No document was produced to show that the land had been given by way of grant either to Somaji or to his ancestors.

Bench: N Kumar in M.A. Sreenivasan vs H.V. Gowthama And Anr. ILR 2005 KAR 1138 Therefore the law on the point is well settled. The probate Court will not go into question of title of the property which is bequeathed under the will. It is totally outside the scope of enquiry in a probate proceedings. If the testator has a right in the property the beneficiary gets that right on the death of the testator under the will. Grant of probate do not divest any person of his title to the property nor vest title in the beneficiary under the Will. The scope of enquiry in a probate proceedings is only to find out whether the will sought to be probated has been duly executed by the testator and is proved in accordance with law and the statutory requirements under the Act have been complied with. Therefore grant of probate in no way affects the right of the person who claims title to the property independently or adverse to the interest of the testator. It does not decide any question of title or the existence of the property itself.

Hon'ble Supreme Court as reported in Chandradhar Goswami & Ors. v. The Gauhati Bank Ltd., ,... **1967 AIR 816, 1967 SCR (1) 921**" Section 4 of the Bankers' Books Evidence Act (18 of 1891) certainly gives a special privilege to banks and allows certified copies of their accounts to be produced by them and those certified copies become prima facie evidence of the existence of the original entries in the accounts and are admitted as evidence

of matters, transactions, and accounts therein. But such admission is only where and to the extent as the original entry itself would be admissible by law and not further or otherwise. Original entries alone under S.34 of the Evidence Act would not be sufficient to charge any person with liability and as such, copies produced under s.4 of the Bankers' Books Evidence Act could not charge any person with liability. Original entries alone under s. 34 of the Evidence Act would not be sufficient to charge any person with liability and as such copies produced under s. 4 of the Bankers' Books Evidence Act obviously cannot charge any person with liability. Therefore, where the entries are not admitted it is the duty of the bank if it relies on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence. But no person can be charged with liability on the basis of mere entries whether the entries produced are the original entries or copies under s. 4 of the Banker's Books Evidence Act. "

In *Zenna Sorabji and others Vs. Mirabelle Hotel Co.(Pvt.) Ltd. and others*, **AIR 1981 Bom 446** , "In order that a document could be relied upon as a book of account, it must have the characteristic of being fool-proof. A bundle of sheets detachable and replaceable at a moment's pleasure can hardly be characterised as a book of account. Moreover what Section 34 demands is a book of account regularly maintained in the course

of business. A ledger by itself could not be a book of account of the character contemplated by Section 34."

Hon'ble Supreme Court in *Ramji Dayawala & Sons (P) Ltd. v. Invest Import*, **1981 AIR 2085, 1981 SCR (1) 899**,"

Undoubtedly, mere proof of the handwriting of a document would not tantamount to a proof of all the contents or the facts stated in the document, if the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue."

A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied.

The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal*, AIR 2004 SC 4794; *Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors.*, AIR 2005 SC 286).

In *DLF Universal Ltd. & Anr. v. Director, T. and C. Planning Department Haryana & Ors.*, AIR 2011 SC 1463, this court held:

“It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties’ private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. As is stated in Anson's Law of Contract, “a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept...Today, the position is seen in a different light.

Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large." The Court assumes "that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency...In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly.”

The phrase, “as is-where-is”, has been explained by this Court in Punjab Urban Planning & Development Authority & Ors. v. Raghu Nath Gupta & Ors., (2012) 8 SCC 197, holding as under: “We notice that the respondents had accepted the commercial plots with open eyes, subject to the abovementioned conditions. Evidently, the commercial plots were allotted on “as-is-where-is” basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on “as-is- where-is” basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on “as-is-where- is” basis, they should not have accepted the allotment and after having accepted the allotment on “as-is-where-is” basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the plots were allotted...”

MERE PRODUCTION AND MARKING OF A DOCUMENT AS EXHIBIT BY THE COURT CANNOT BE HELD TO BE A DUE PROOF OF ITS CONTENTS

Narbad Devi Gupta Vs. Birendra Kumar Jaiswal JT (2003) 8 SC 267 laying down that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents till its execution has been proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue;

BURDEN OF PROOF WHEN FRAUD MISREPRESENTATION ALLEGED AND PERSON IN DOMINATION OF OTHERS

Court in **Krishna Mohan Kul @ Nani Charan Kul and Anr. v. Pratima Maity and Ors. MANU/SC/ 0690/2003 : AIR 2003 SC 4351** . In that case, the question of burden of proof was gone into after the parties had adduced evidence. It was brought on record that the witnesses whose names appeared in the impugned deed and which was said to have been created to grab the property of the plaintiffs were not in existence. The question as regards oblique motive in execution of the deed of settlement was gone into by the Court. The executant was more than 100 years of age at the time of alleged registration of the deed in question. He was paralytic and furthermore his mental and physical condition was not in order. He was also completely bed-ridden and though his left thumb impression was taken, there was no witness who

could substantiate that he had put his thumb impression. It was on the aforementioned facts, this Court opined:- 12 ...The onus to prove the validity of the deed of settlement was on the defendant No. 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person, in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position....

BURDEN OF PROOF AND ONUS OF PROOF

In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr. MANU/SC/0798/2003 : AIR 2003 SC 4548 , the law is stated in the following terms: 29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in *A. Raghavamma v. A. Chenchamma* MANU/SC/0250/1963 : [1964]2SCR933 there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.

Hon'ble Supreme Court in the case of **Anil Rishi v. Gurbaksh Singh, reported in MANU/SC /8133/2006 : (2006) 5 SCC 558.** Paragraph 19 of the said judgment is quoted herein below: "19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to

begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (ii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."

Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.: MANU/GJ/0774/2018 It is one of the fundamental principles of the law of evidence in India that a party on whom burden of proof lies must discharge it by bringing the best evidence available before the Court and where a party does not do so, the Court will be justified in concluding that it would, if brought, not support the case of the party. There is no presumption that an act was done, of which there is no evidence, and the proof of which is essential to the case raised.

The general rule as to the onus of proof and the consequent obligation of beginning is, that the proof of any particular fact lies on the party who alleges it, not on him who denies it, "ei incumbit probatio qui dicit, non qui negat" vide Amir Ali and Woodroffe's Law of Evidence page 603 (Eighth Edition). The reason of the rule is, first that it is but just that he who invokes the aid of the law should be the first to prove his case, and,

secondly, that a negative is more difficult to establish than an affirmative. These principles have been clearly laid down in Sections 101 and 103 of the Evidence Act which are as follows: "101. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove these facts. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. "103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Supreme Court observed in **MANU/SC/0330/1975 : AIR 1975 SC 1534 [Dr. N.G. Dastane v. Mrs. S. Dastane]** in regard to the standard of proof applicable in a civil case. The relevant passage reads as follows: "24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Sec. 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court

applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: 'the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue' Per Dixon, J. in *Wright v. Wright*, (1948) 77 CLR 191 at p. 210; or as said by Lord Denning, 'the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear. *Blyth v. Blyth*, 1966-1 All ER 524 at p. 536.' But whether the issue is one of cruelty or of a loan on a pro-note, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."

IN A SUIT FOR DISPUTED PROPERTY THE BURDEN TO PROVE TITLE TO THE LAND SQUARELY FALLS ON THE PLAINTIFF

Court in Corporation of City of Bangalore v. Zulekha Bi and Ors. MANU/SC/7346/2008 : (2008) 11 SCC 306, Gurunath Manohar Pavaskar and Ors. v. Nagesh Siddappa Navalgund and Ors. MANU/SC/8191/2007 : (2007) 13 SCC 565 and Anil Rishi v. Gurbaksh Singh MANU/SC/8133/2006 : (2006) 5 SCC 558, wherein it has been specifically held by Court that in a suit for disputed property the burden to prove title to the land squarely falls on the Plaintiff.

TESTIMONY OF THE INTERESTED WITNESSES IN SUPPORT OF ORAL AGREEMENT CANNOT BE RELIED UPON

In the case of S.R. Balakrishnan and another v. Yakoob and Others reported in MANU/KE/0603/2001 : AIR 2001 KERALA 215, it is specifically reiterated that testimony of the interested witnesses in support of oral agreement cannot be relied upon. Convincing evidence must be placed on record to establish the terms of the oral agreement.

Hon'ble Apex Court in the case of Ouseph Varghese v. Joseph Aley and Others reported in MANU/SC/0493/1969 : 1992 (2) SCC 539. It has specifically held that burden of proving the oral agreement in a suit filed for specific performance is always heavy and it has to be satisfactorily proved. Plea of readiness and

willingness must not only be satisfactorily pleaded but also satisfactorily proved by placing acceptable evidence. Readiness means financial capacity of the person intending to purchase the property right from the date of oral agreement upto the date of obtaining sale deed. Willingness is the eagerness to have the sale deed. Though both of these aspects are different, these aspects will have to be satisfactorily proved.

AFFIDAVIT CANNOT BE RELIED WITHOUT CROSS EXAMINATION OF DEPONENT

Bareilly Electricity Supply Co.Ltd vs The Workmen (AIR 1972 SC 330) the affidavit could not have been relied upon without the author being put through the test of cross examination.

DOCUMENTARY EVIDENCE – PRIMARY - SECONDARY

M. Chandra v. M. Thangmuthu and another, AIR 2011 SC 146: On the issue of proof by secondary evidence, it was held by Hon'ble the Supreme Court that it is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by

foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.

Bank of India v. M/s Allibhoy Mohammed and others, AIR 2008 Bombay 81: Hon'ble the Supreme Court held that the document produced as primary or secondary evidence has to be proved in a manner laid down in Sections 67 to 73 of the Evidence Act. With regard to secondary evidence, it has been held that the same cannot be accepted unless sufficient reason given for non-production of original. The loss of original document must be shown in order to lead secondary evidence. Secondary evidence of the document can be allowed to be lead only where original is proved to have existed but was lost or misplaced. The prior permission of the Court is required to be taken for producing secondary evidence of the documents on the grounds that original documents were lost. When anybody wants to lead secondary evidence, two things are required to be proved; there must be evidence of the existence of the original documents and there must be evidence of their loss.

Smt. J. Yashoda v. Smt. K. Shobha Rani, AIR 2007 SC 1721: In this case, the documents in question were admittedly photocopies and there was no possibility of said documents being compared with original as same were with another person. On

the point of admissibility of such documents as secondary evidence, it was held by Hon'ble the Supreme Court that conditions in Section 65(a) of the Evidence Act had not been satisfied, therefore, the documents cannot be accepted as secondary evidence. It was further observed that Section 65 of the Evidence Act permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.

Kaliya v. State of Madhya Pradesh, 2013 (3) R.C.R. (Criminal)

958: Hon'ble the Supreme Court held that Section 65(c) of the Evidence Act provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. The court is obliged to examine the probative value of documents produced in court or their contents and decide the question of admissibility of a document in secondary evidence. It was further observed that however, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it

and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof and mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law.

Pratap Kishore and another v. Gyanendranath, AIR 1951

Orissa 313: A Division Bench of Orissa High Court in this case has held that where certain documents have been marked as exhibits in a case without objection but the contents thereof have not been put to the persons connected with them either in their chief examination or cross-examination, it is not possible to make use of the statements made therein for the purpose of drawing inferences one way or the other.

**WHEN OBJECTION AS TO MARKING OF DOCUMENT RAISED
PROPER PROCEDURE TO FOLLOW**

Hon'ble Supreme Court in the case of Bipin Shantilal Panchal v. State of Gujarat and Anr. AIR 2001 SC 1158 : (2001)3 SCC 1 : 2001. Cri. L.J. 1254 (SC), wherein, it is observed as under.-

"12. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But, the fall out of the above practice is this: Suppose the Trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the Appellate or the Revisional Court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the Appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the Trial Court. In such a situation the higher Court may have to send the case back to the Trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings.

13. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking

stage regarding the admissibility of any material or item of oral evidence the Trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

14. The above procedure, if followed, will have two advantages. First is that the time in the Trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the Trial Court, can determine the correctness of the view taken by the Trial Court regarding that objection, without bothering to remit the case to the Trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

15. We, therefore, make the above as a procedure to be followed by the Trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence".

DOCUMENTARY EVIDENCE AT APPEAL STAGE

In Billa Jagan Mohan Reddy and another v. Billa Sanjeeva Reddy and others, (1994) 4 SCC 659, Hon'ble the Supreme Court opined that if the documents are found to be relevant to decide the real issue in controversy and when the court feels that interest of justice requires that the documents may be received, exercising the power under Order 41 Rule 27 CPC, the appellate court would receive those documents and consider the effect thereof. However, an opportunity be given for rebuttal, if any, and their relevance and effect be considered in deciding the issues arising in controversy.

In Ram Kishan v. Inder Pal and others, 2004(3) RCR (Civil) 572, (P & H) court, while considering the issue regarding production of additional evidence at the appellate stage, observed as under: "5. The afore-mentioned provision have been subject-matter of interpretation of the Supreme Court in the case of K. Venkataramiah v. A. Seetharama Reddy and others, AIR 1963 SC 1526; Natha Singh v. The Financial Commissioner, Taxation, AIR 1976 SC 1053; Land Acquisition Officer v. H. Narayanaiah etc., AIR 1976 SC 2403 and P. Purushottam Reddy and another v. Pratap Steels Ltd., (2002(2) RCR (Civil) 70 (SC): 2002(2) SCC 686.

On the basis of the afore-mentioned judgments it can be concluded that the Ld. Additional District Judge while hearing the appeal under Section 96 of the (sic) enjoys adequate power to allow additional evidence if such evidence is required to enable him to pronounce the judgment. He can also allow the additional evidence for any other substantial cause advancing administration of justice. The judgment of the Rajasthan High Court in the case of Vishnu Iron and Steel Industries's case (supra) on which reliance has been placed has also concluded that the first appellate court has adequate power to allow additional evidence if such evidence is necessary to pronounce the judgment."

In North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (D) by Lrs, 2008(3) RCR (Civil) 165, the issue has been considered in detail by Hon'ble the Supreme Court and certain broad principles were laid down, namely, acceptance of application may not result in injustice to other party and that it is necessary for the purpose of determining the real question in controversy between the parties. Relevant paragraphs thereof are extracted below: "14. Again in K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526 a Constitution Bench of this court while reiterating the afore-noted observations in Parsotim's case (supra), pointed out that the appellate court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment' but also for 'any other substantial cause'. There may well be cases where

even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Thus, the question whether looking into the documents, sought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the court at the time of hearing of the appeal on merits.

15. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil & Ors.*, AIR 1957 SC 363 which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions:

- (a) of not working injustice to the other side, and
- (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. (Also see: *Gajanan Jaikishan Joshi v.*

Prabhakar Mohanlal Kalwar, 1990(1) RCR (Rent) 229: 1990(1) RRR 222: 1990 Civ. C.C. 277 (SC).

16. These are the broad principles to be kept in view while dealing with applications under Order 41 Rule 27 and Order 6 Rule 17 CPC.

NEWS PAPER REPORTS AND EVIDENTIARY VALUE

Samant N.Balkrishna and another Vs. George Fernandez and other reported in 1969 (3) SCC 238 at paragraph 26, the Apex Court observed that "A newspaper item without any further proof of what had actually happened through witnesses is of no value. It is at best a second hand evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publish it. In this process truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible."

Supreme Court in Lakmi Raj Shetty and another Vs. State of Tamil Nadu reported in 1988 (3) SCC 319, opined that "...We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached

under Section 81 of the Evidence Act to a newspaper report cannot be treated as proved of the facts reported therein."

The Supreme Court dealing with a "pro bono publico" litigation in B.P.Singhal Vs.State of Tamil Nadu and others reported in 2004 (13) SCC 673, wherein the petitioner sought for a transfer of an investigation from Tamil Nadu State Police to the Central Bureau of Investigation, opined that: "the petition is lacking in material particulars. All the averments made in the petition are based, by and large, on news reports and not on personal knowledge. The petition does not state that the petitioner has taken any care to verify himself the correctness of the averments made."

Dr.B.Singh Vs. Union of India (UOI) and others reported in 2004 (3) SCC 363 dealing with a public interest litigation, challenging the propriety of the third respondent therein for being considered for appointment as a Judge, the Supreme Court while expressing its anguish found that: "the petitioner has nowhere stated that he has personal knowledge of the allegations made against R3. He does not even aver that he made any effort to find out whether the allegations have any basis. He only refers to the representation of Ram Sarup and some other paper cuttings of news items. It is too much to attribute authenticity or creditability to any information or fact merely because, it found publication in a newspaper or journal or magazine or any other form of communication, as though it is gospel truth. It needs no

reiteration that newspaper reports per se do not constitute legally acceptable evidence."

In Quamarul Islam v. S.K.Kanta (AIR 1994 SC 1733) it was observed by the Honourable Supreme Court as follows:-
 "Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled.

..... Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act".

Court in Dev Sebastian v. P.R.Kurup (AIR 1997 Kerala 214) relied upon a number of Supreme Court judgments mentioned therein and held:- "Here since the allegations are solely based on paper reports and no evidence was placed by the petitioner in support of the reports appeared in the paper, if this Court act it will be only based on hearsay evidence and doing a constitutional injustice".

In the case of Rakesh Chand Narain v. State of Bihar, 1986 (Supp) SCC 576, the court took up the matter on the report published in the newspaper pointing sub-standards conditions existing in Ranchi Mental Hospital and the court issued directions for provisions of various amenities to the patients and

for periodical visit of Chief Judicial Magistrate to the hospital and to submit report to the Court.

Apex Court in R.S.Singh v. U.P. Malaria Nirikshak Sangh [(2011) 4 SCC 281] that the Apex Court has time and again deprecated the practice of summoning senior officials of the State and Central Governments in court, except in exceptionally exceptional cases and the conduct of the State Authority in summoning the officers in the stature of the petitioner and others on a complaint of the instant nature lodged solely based on the print and visual media reports would adversely affect the decorum of their office.

Ravinder Kumar Sharma v. State of Assam and others [(1999) 7 SCC 435], "Newspaper reports regarding the Central Government decision could not be any basis for the respondents to stop action under the Assam Control Order of 1961. The paper reports do not specifically refer to the Assam Control Order, 1961. In fact, the Government of Assam itself was not prepared to act on the newspaper reports, as stated in its wireless message. Section 81 of the Evidence Act was relied upon for the appellant, in this behalf, to say that the newspaper reports were evidence and conveyed the necessary information to one and all including respondents 2 and 3. But the presumption of genuineness attached under Section 81 to newspaper reports

cannot be treated as proof of the facts stated therein. The statements of fact in newspapers are merely hearsay”

EVIDENCE ON PLEA RAISED

The Hon'ble Supreme Court In Om Prabha v. Abnash Chand, AIR 1968 SC 1083, has observed that the ordinary rule of law is that evidence should be given only on plea properly raised and not in contradiction of the plea.

Devi Shankar vs Ugam Raj AIR 2002 Raj 330 The rule of *secundum allegata et probata* is based mainly on the principle that no party should be taken by surprise by the change of case introduced by the opposite party. Therefore, the test, when an objection of this kind is taken, is to see whether the party aggrieved has really been taken by surprise, or is prejudiced by the action of the opposite party. In applying this test the whole of the circumstances must be taken into account and carefully scrutinised to find out whether there has been such surprise or prejudice as will disentitle a party to relief. Every variance, therefore, between pleading and proof is not necessarily fatal to the suit or defence and the rule of *secundum allegata et probata* will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby. A variation which causes surprise and confusion is always looked upon with considerable disfavour. But, where a ground though not raised in the pleadings is expressly put in issue or where the new claim set up is not inconsistent with the allegations made in the

pleadings and is based on facts alleged therein, there is no question of surprise to the opposite party. So also. where although there was no specific plea or specific issue on a particular question, the parties have gone to trial with the full knowledge that the question was in issue and adduced evidence, there can be no prejudice. Whether a plea has been raised may be gathered from the pleadings taken as a whole, and if a sufficient plea is disclosed and the parties have led evidence on the point the Court can give relief on such plea.

In Firm Srinivas Ram Kumar v. Mahabir Prasad, AIR 1951 SC 177, the Hon'ble Supreme Court has held as under:-- "A plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent acts of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made In the suit. there would be nothing Improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of

adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit."

The Hon'ble Supreme Court in Trojan & Co. Ltd. v. Nagappa Chettiar, AIR 1953 SC 235 has held as under :-- The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment in the plaint the Court held was not entitled to grant the relief not asked for."

In Bhagwati Prasad v. Chandramaul, AIR 1966 SC 735, the Hon'ble Supreme Court, after analysing the law laid down in the case of Trojan & Co. Ltd. v. Nagappa Chettiar (supra), has further stated that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not disentitle a party from relying upon it if it is satisfactorily proved by evidence. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. But, if the parties led evidence knowing what they are going to allege

and prove, then in such case general rule would not be applicable and the case would be covered by an issue by implication that though the matter has not been specifically pleaded, yet it is implied in the pleadings of the parties.

In Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College, AIR 1987 SC 1242, the Hon'ble Supreme Court has held that it is not desirable to place undue emphasise on form. Instead substance of pleadings should be considered.

The Hon'ble Supreme Court in Bhim Singh v. Ran Singh. AIR 1980 SC 727 has held that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expresly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactory proved by the evidence.

In Kali Prasad v. Bharat Coking Coal Ltd. AIR 1989 SC 1530, it has been held by the Hon'ble Supreme Court that where the parties went to trial knowing fully well what they were required to prove and they had adduced evidence of their choice in support of the respective claims and that evidence was considered by both courts below, they could not be allowed to turn round and say that the evidence should not be looked into.

National Textile Corporation Limited vs. Naresh Kumar Badrikumar Jagad and Ors., (2011) 12 SCC 695, the Supreme Court held as hereunder: "12. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide *Trojan & Co. v. Nagappa Chettiar* [AIR 1953 SC 235] , *State of Maharashtra v. Hindustan Construction Co. Ltd.* [(2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207 : AIR 2010 SC 1299] and *Kalyan Singh Chouhan v. C.P. Joshi* [(2011) 11 SCC 786 : (2011) 4 SCC (Civ) 656 : AIR 2011 SC 1127] .)

In J. Jermons v. Aliammal [(1999) 7 SCC 382] while dealing with a similar issue, this Court held as under: (SCC p. 398, paras 31-32) "31. ... there is a fundamental difference between a case of raising additional ground based on the pleadings and the material available on record and a case of taking a new plea not borne out by the pleadings. In the former case no amendment of pleadings is required whereas in the latter it is necessary to amend the pleadings. ... 32. ... The respondents cannot be

permitted to make out a new case by seeking permission to raise additional grounds in revision."

ORAL AGREEMENT AND BURDEN OF PROOF

In P.PRABHAKARA RAO vs. P.KRISHNA reported in AIR 2007 AP page 163, the Andhrapradesh High Court held, payment of consideration spread over four years was not acceptable. In case of oral sale agreement the burden is on the plaintiff to prove that there was consensus ad idem between the parties for a concluded oral agreement of sale. The plaintiff did not take any steps on his own accord, in the matter of seeking specific performance of the alleged oral agreement. He swung into action only after he received notice demanding vacant possession. No oral evidence was adduced to speak to the factum of conditions of oral agreement. The plaintiff has failed to prove the existence of consensus ad idem and the oral agreement.

THE BURDEN OF PROVING A FACT ALWAYS LIES UPON THE PERSON WHO ASSERTS

Rangammal v. Kuppuswami and another, 2011 (4) R.C.R. (Civil) 251 (Para 14):

Hon'ble the Supreme Court held that the burden of proving a fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. Court cannot proceed on the basis of weakness of

the other party. Misplacing burden of proof would vitiate judgment. Para 14 of the judgment reads as under:- "14. Section 101 of the Indian Evidence Act, 1872 defines 'burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party. In view of this legal position of the Evidence Act, it is clear that in the instant matter, when the plaintiff/respondent No.1 pleaded that the disputed property fell into the share of the plaintiff by virtue of the sale deed dated 24.2.1951, then it was clearly for the plaintiff/respondent No.1 to prove that it was executed for legal necessity of the appellant-while she was a minor. But, the High Court clearly took an erroneous view while holding that it is the defendant/appellant who should have challenged the sale deed after attaining majority as she had no reason to do so since the plaintiff /respondent No.1 failed to first of all discharge the burden that the sale deed in fact had been executed for legal necessity of the minor's predecessor mother was without permission of the court. It was not the defendant/respondent who first of all claimed benefit of

the sale deed or asserted its genuineness, hence the burden of challenging the sale deed specifically when she had not even been dispossessed from the disputed share, did not arise at all."

PRESUMPTION UNDER THE EVIDENCE ACT THAT ALL OFFICIAL ACTS DONE BY THE OFFICIAL ARE DONE IN ACCORDANCE WITH PROPER PROCEDURE

RAMAKRISHNA GANAPAYYA vs. LAKSHMI NARAYANA THIMAYYA 1983 (2) KLJ 409

In paragraph 14 it has been observed - "It may, at once, be stated that there is a presumption under the Evidence Act that all official acts done by the official are done in accordance with proper procedure. It is not the defendant who has come to Court challenging such official act of the Tahsildar. It is the plaintiff who has come to Court challenging that the procedure followed by the Tahsildar was not in accordance with law. That being so, it is obvious that the burden is on the plaintiff to call for necessary records, making the Tahsildar a party to the suit and show that the procedure followed by him is vitiated either because there was no notice or because he has violated fundamental principles of natural justice."

PROPER APPRECIATION OF DOCUMENTS AND EVIDENCE

THE HON'BLE MR. JUSTICE SUBHASH B. ADI of Karnataka High Court in the case of R Laxman vs M S Lingegowda Since Dead By Lrs Decided on 13 February, 2013 - No doubt, the pleadings in the plaint do not show that the plaintiff has stated the source of his title to the suit schedule property. The entire

pleadings show that the plaintiff has based his claim only on the basis of the revenue records. However, during the course of his evidence, he sought to produce Ex.P20, which stands in the name of the uncle of the plaintiff and he claimed that, there was subsequent partition and the suit schedule property had fallen to his share, however, such a pleading is not forthcoming in the plaint. However, the plaintiff admittedly, has produced Exs.P1 to P6 and it shows the plaintiff's name in the cultivator's column and in the kabzedar's column, the name of the brother of the plaintiff is shown. Under Section 133 of the Karnataka Land Revenue Act, the entries in the revenue records create presumption that they are true, unless rebuttable evidence is led. Ex.D2 is a pahani, wherein the name of defendant No.4, one of the legal representatives of the original defendant is shown in the cultivator's column. It is not known as to how for the first time in 1982-1983, the name of defendant No.4 is entered. The trial Court, without referring to the entries in the said documents and without referring to Survey Nos., only on the ground that there was an order passed by the Appellate Tribunal against the brother of the plaintiff, has dismissed the suit. In my opinion, the trial Court has utterly failed to appreciate the evidence on record in the proper perspective. When there is a dispute between the parties, the better title between the parties has to be ascertained and to appreciate the same, the trial Court should have looked into the oral as well as the documentary evidence of both the parties. Even the documents referred to by the trial Court have been wrongly understood.

**PROVE BY ACCEPTABLE EVIDENCE THAT THE EXECUTANT
AFFIXED HIS SIGNATURE TO THE DOCUMENT AFTER BEING
AWARE OF THE CONTENTS OF THE DOCUMENT**

**Mariam Hussain W/O. Zaheed Hussein vs Syedani W/O. Late
Syed Mustafa And Ors. ILR 2007 KAR 2715 JUSTICE N.**

KUMAR OBSERVED: It is to be noticed here that Ex.P-1, is not a simple agreement of sale entered into between the parties voluntarily where one party is interested in selling his property and the other interested in purchasing the property, after mutual discussion and negotiation agreed on a price and then reduce the terms in writing. It is a case of want of consensus ad-idem. Similarly execution of a document does not mean signing of a document. The word "execution" has a definite connotation in law. The person signing the document must be aware of the contents of document and consciously sign the document in token of acceptance of the contents of the said document. If the execution of a document is denied it is for the party who alleges the due execution to prove by acceptable evidence that the executant affixed his signature to the document after being aware of the contents of the document and in token of its acceptance so as to bind him. When it is stated that the executant executed an agreement of sale it must be shown that the executant had agreed to sell the property end in token of acceptance of such agreement he has affixed his signature on the said agreement of sell. The evidence on record do not disclose that the defendant affixed his signature to the the suit document agreeing to sell the

schedule property in favour of the plaintiffs or in view of the decision of Panchayatdars or on the basis of what was agreed to in the said Panchayat. Therefore the finding of the courts below that the agreement of sale is duly executed by the first defendant, as it bears his signature on the document is illegal. The material on record disclose that this property was granted to the first defendant 30 years prior to the date of the suit. Mutation entries were made in his name. Attempt to delete the said mutation entry by the plaintiff was not successful. The defendant also obtained a decree of permanent injunction against the plaintiff. The material on record shows that he was cultivating the land and he has raised (sic) trees and on 18.08.1982 he has handed over possession of the property from that day till today. Ignoring all these material evidence on record only relying on the interested testimony of the plaintiff and his witness, whose evidence, as already stated do not infuse confidence, the courts below have recorded a finding that the plaintiff is in possession and the first defendant in not in possession. The said finding is perverse and capricious and cannot be sustained.

Chapter VI of the Karnataka Land Revenue Act, 1964 (hereinafter called 'the Act') deals with maintenance of Record of Rights. Section 128 deals with acquisition of rights to be reported, Section 129 deals with registration of Mutations and the procedure for such registration, Section 129A deals with issue of patta book containing the copy of the Record of Rights pertaining to such land. Section 130 deals with the obligation to furnish information for compilation or revision of the Record of

Rights and as to the bar of suits against the State Government or its officials in respect of daims for having the entry made in the Record of Rights, reserving expressly the right to seek a correction of the entry in the Record of Rights against persons who are interested in denying such a right. It is clear from the above provisions that the entries in the Record of Rights made after enquiry as provided for in Section 129 of the Act is always subject to a final adjudication of the rights between the parties to the land in question. At this stage, it is also necessary to observe and reiterate that the enquiry is essentially summary in nature.

NO IMPORTANCE TO ORAL EVIDENCE TO CHANGE TERMS OF SALE DEED

THE HON'BLE MR. JUSTICE A.V.CHANDRASHEKARA of HIGH COURT OF KARNATAKA, In the case of Narayan vs Shridhar Decided on 3 April, 2014 (RSA NO.5663 OF 2010) held that "The undisputed fact is that the total extent of Sy.No.77/2 was 4 acres 20 gunta inclusive of 5 gunta kharab land. Out of the said property, plaintiff's father-in-law sold 2 acre 23 guntas in favour of the father of the defendant as per Ex.P21. 20 guntas of land already with the defendant. Therefore, the remaining extent of property measuring 1 acre 17 guntas is with the plaintiff and therefore, the plaintiff has sought the reliefs of declaration and permanent injunction. Mere adverse entry in the revenue records will not take away the right that a party has. Any amount of oral evidence sought to be adduced on behalf of the

defendant to vary the terms of the sale deed with reference to the extent will not be of much importance and this has been taken note of by the trial Court as well as the first appellate Court.”

SUB-REGISTRAR HAS NO OPTION BUT TO REGISTER THE DOCUMENT UNLESS THE DOCUMENT IS NOT IN CONFORMITY WITH THE PROVISIONS OF THE INDIAN REGISTRATION ACT OF 1908

Smt. Sulochanamma v. H. Nanjundaswamy and others [MANU/KA/0026/2001 : 2001 (1) KLJ 215], it has been held that when a document is presented for registration fulfilling all requirements, the Sub-Registrar has no option but to register the document unless the document is not in conformity with the provisions of the Indian Registration Act of 1908 and the relevant rules. In the said case, the registration of the deed was refused on the basis of the communication received from the Tahsildar that the revenue documents were all bogus and false. It was held that the Sub-Registrar was entrusted with the duty of registering the documents in accordance with the provisions of the Act and he was not authorised to go into the genuineness or otherwise of the documents presented before him. If the documents are bogus or false, the party affected by it will have the right to initiate both civil and criminal proceedings to prosecute the party who tries to have benefit from such document and also to safeguard his right, title and interest. It was not for either the Tahsildar or the Sub-Registrar to express opinion as to the genuineness or otherwise of

the documents, unless called upon by the Court of law or any other authorised investigating agency were the observations in the said case.

S. Sreenivasa Rao v. Sub Registrar [MANU/KA/0456/1990 : ILR 1990 Kar. 3740], a Division Bench has held that if a document is presented for registration by the executant, and in doing so, the executant complies with all the provisions of Registration Act, 1908, it is not open to the Sub-Registrar to refuse registration of the document unless, he exercises that discretion pursuant to any provision in the Act, or any other law or Rule having the force of law. The mere registration of a document is by itself not a proof of its validity, neither does it follow that the executant had title to the property, he seeks to dispose of under the document. Matters such as relating to title have to be decided before the appropriate forum. If any person is interested in contending that any particular document executed and registered under the Registration Act, 1908 is invalid or illegal for any reason whatsoever, he is certainly at liberty to question the validity of the document, the title of the executant, and such other questions before the proper forum in an appropriate proceeding.

A.G. Shivalingappa v. A.G. Shankarappa [MANU/KA/0320/1990 : ILR 1991 Karnataka 1804], it has been held that Section 34 of the Act lays down the nature of enquiry to be held by the Sub-Registrar before registering a

document. That it is quite patent that the Sub-Registrar is required to make an enquiry, whether the document has really been executed by a person who purports to execute the document, and further as to the identity of the executant or his representative who appears before him. It is well settled that the question as to the validity of the document is alien to such an enquiry. If the executant admits having executed a document, the Sub-Registrar must order registration of the document if presented in accordance with the provisions of the Act.

FILING OF FALSE AFFIDAVITS OR MAKING FALSE STATEMENT ON OATH IN COURTS

In Dhananjay Sharma v. State of Haryana, (1995) 3 SCC 757, the Supreme Court observed:any conduct which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt...The swearing of false affidavits in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice. The filing of false affidavits in judicial proceedings in any court of law exposes the intention of the party concerned in perverting the course of justice. The due process of law cannot be permitted to be slighted nor the majesty of law be made a mockery of by such acts or conduct on the part of the parties to the litigation or even while appearing as witnesses. Anyone who makes an attempt to impede or undermine or obstruct the free

flow of the unsoiled stream of justice by resorting to the filing of false evidence, commits criminal contempt of the court and renders himself liable to be dealt with in accordance with the Act. Filing of false affidavits or making false statement on oath in courts aims at striking a blow at the rule of law and no court can ignore such conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false affidavits or giving of false statements and fabricating false evidence in a court of law...

In Afzal v. State of Haryana : (1996) 7 SCC 397, the Supreme Court held as under:... Section 2(b) defines "contempt of court" to mean any civil or criminal contempt. "Criminal contempt" defined in Section 2(c) means interference with the administration of justice in any other manner. A false or a misleading or a wrong statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order would prejudice or interfere with the due course of judicial proceedings. ... He first used fabricated counter-affidavit, forged by Krishan Kumar in the proceedings to obtain a favourable order. But when he perceived atmosphere adverse to him, he fabricated further false evidence and sought to use an affidavit evidence to show that Krishan Kumar had forged his signature without his knowledge and filed the fabricated document. Thereby he further committed contempt of the judicial process. He has no regard for truth. From stage to stage, he committed contempt of court by making false

statements. Being a responsible officer, he is required to make truthful statements before the Court, but he made obviously false statements. Thereby, he committed criminal contempt of judicial proceedings of this Court.

In Rita Markandey v. Surjit Singh Arora (1996) 6 SCC 14, the Supreme Court observed under: ... by filing false affidavits the respondent had not only made deliberate attempts to impede the administration of justice but succeeded in his attempts in delaying the delivery of possession. We, therefore, hold the respondent guilty of criminal contempt of court.

In Re: Bineet Kumar Singh (2001) 5 SCC 501, the Supreme Court held as under:...Criminal Contempt has been defined in Section 2(c) to mean interference with the administration of justice in any manner. A false or misleading or a wrong statement deliberately and wilfully made by party to the proceedings to obtain a favourable order would undoubtedly tantamount to interfere with the due course of judicial proceedings. When a person is found to have utilised an order of a Court which he or she knows to be incorrect for conferring benefit on persons who are not entitled to the same, the very utilisation of the fabricated order by the person concerned would be sufficient to hold him/her guilty of contempt, irrespective of the fact whether he or she himself is the author of fabrication...

In Chandra Shashi v. Anil Kumar Verma (1995) 1 SCC 421, the Supreme Court held as under: Anyone who takes recourse to

fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice...There being no decision of this Court (or for that matter of any High Court) to our knowledge on this point, the same is required to be examined as a matter of first principle. Contempt jurisdiction has been conferred on superior courts not only to preserve the majesty of law by taking appropriate action against one howsoever high he may be, if he violates court's order, but also to keep the stream of justice clear and pure so that the parties who approach the courts to receive justice do not have to wade through dirty and polluted water before entering their temples....To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. The word '_interfere', means in the context of the subject, any action which checks or hampers the functioning or hinders or tends to prevent the performance of duty obstruction of justice is to interpose obstacles or impediments, or to hinder, impede or in any manner interrupt or prevent the administration of justice. Now, if recourse to falsehood is taken with oblique motive, the same would definitely hinder, hamper or impede even flow of justice and would prevent the courts from performing their legal duties as they are supposed to do.... if the publication be with intent to deceive the court or one made with an intention to defraud, the

same would be contempt, as it would interfere with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated document is filed with the aforesaid mens rea. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large.

In Dalip Singh v. State of U.P., (2010) 2 SCC 114, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:- "1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post- Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the

challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

PERSONAL KNOWLEDGE OF THE TRANSACTION TO PROVE THE TRANSACTION

Man Kaur (dead) by L.Rs. v. Hartar Singh Sangha MANU/SC/0789/2010 : (2010) 10 SCC 512. Court has held that where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent alone can give evidence in regard to the transaction. This Court further observed: Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

WHO SHOULD GIVE EVIDENCE IN REGARD TO THE MATTERS INVOLVING PERSONAL KNOWLEDGE

Man Kaur (dead) by LRS. v. Hartar Singh Sangha (2010) 10 SCC 512, court has held that where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent alone can give evidence in regard to the transaction. This court further observed: "Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

PROCEDURE TO LEAD SECONDARY EVIDENCE

AIR 2006 KARNATAKA 95 (Gafarsab alias Sati Gafar Sab vs. Ameer Ahmad), wherein it has been held that "a party to the proceedings is not expected to file any application requesting the

Court to permit him to lead the secondary evidence. All that is expected of him is to step into the witness- box and lead evidence setting out the circumstances under which he is unable to produce the primary evidence. If the Court is satisfied from such evidence that a case is made out for production of secondary evidence, it can permit the party to adduce secondary evidence subject to Sections 63 and 65 of the Act"

1998 (5) Kar.L.J.360 (G. Chikkapapanna alias G. C.Papanna vs. Smt. Kechamma (deceased) by L.Rs and Others) held that "to prove the execution, the certified copy of the documents itself is not sufficient and the same is not admissible as secondary evidence when the party producing it has not called upon opposite party to produce original and when it is not party's case that original has been lost or destroyed"

AIR 1987 ORISSA 138 (Bhaskar Sahu v. Anama Swara and others) wherein the High Court of Orissa held that "when a certified copy is allowed to be produced under Section 65, there is no presumption as to the genuineness or the execution of the original and the Court should not admit a document merely on the ground that it is certified copy of the original, unless the execution of the original is proved or admitted by the persons against whom the same is to be relied on".

Apex Court reported in AIR 2000 SC 1759 (State of Rajasthan and others vs. Khemraj and others), it was held by the Apex Court that to invoke the provisions of Section 65 of the Evidence

Act, the application for production must be filed along with the full details and it must be supported by the affidavit.

Apex Court reported in AIR 1966 SC 1457 (The Roman Catholic Mission vs. The State of Madras and another), wherein the Apex Court considering the provisions of Section 65 of the Evidence Act held that "unless the foundation is laid for establishment of right to give secondary evidence, the certified copies of original are not admissible in evidence."

EARLIER REGISTERED DOCUMENT CANNOT BE CONTRADICTED BY ORAL EVIDENCE

AIR 1979 SC 1880 (SMT. KRISHNABAI GANPATRAO DESHMUKH VS. APPASAHEB TULJARAMRAO NIMBALKAR AND OTHERS) there is a bar u/S 92 of the Evidence Act to lead oral evidence contradicting the contents of the earlier registered document of partition.

COMPETENCY OF GPA HOLDER AS A WITNESS

In Vashdeo Bjhojwani AIR 2005 SCC 217, the Apex Court held as follows: "12 The power of attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal."

In Shambhu Dutt Shastri 1986 (2) WLN 713, the Rajasthan High Court held as follows: "A general power of attorney holder can appear, plead and act on behalf of the party, but he becomes a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness-box on behalf of himself. To appear in a witness-box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff."

In Indira Devi MANU/AP/0393/2003 : 2003 (4) ALD 302 (DB), the Division Bench of AP High Court, ruled as follows:

"16. Therefore, the requirement is that when GPA-holder is representing the party, the Judge is required to record in writing that he is permitted to appear and act on behalf of the party. In the instant case, the procedure prescribed under Rule 32 of Civil Rules of Practice has been followed. The case dealt with by the learned Single Judge of Rajasthan High Court was on a different footing. Apart from that, thus when once a person files a suit on behalf of the party, as a GPA holder he enters into the shoes of that party and except to the extent of personal knowledge, he is entitled to depose on other facts. In the instant case, what was relied upon by the plaintiffs is entirely documentary evidence, which are public documents and no personal knowledge was required to be pressed into service to establish the case of Plaintiff."

MISPLACED BURDEN OF PROOF VITIATES JUDGEMENT

Hon'ble Supreme Court in the case of Rangammal v. Kuppuswami & Anr., reported in MANU/SC /0620 /2011 : 2011 (4) JCR 37 (SC). Paragraphs 20 to 23 of the said judgment are quoted herein below: "20. Since the High Court has misplaced burden of proof, it clearly vitiated its own judgments as also of the courts below since it is well established dictum of the Evidence Act that misplacing burden of proof would vitiate judgment. It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way definitely vitiates the judgment as it has happened in the instant matter. This position stands reinforced by several authorities including the one delivered in the case of Koppula Koteswara Rao vs. Koppula Hemant Rao, 2002 AIHC 4950 (AP).

21. It has been further held by the Supreme Court in the case of State of J & K vs. Hindustan Forest Company, 2006 (12) SCC 198, wherein it was held that the onus is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.

22. It was still further held by this Court in the matter of Corporation of City of Bangalore vs. Zulekha Bi, MANU/SC/7346/2008 : 2008 (11) SCC 306 (308) that it is for the plaintiff to prove his title to the property. This ratio can

clearly be made applicable to the facts of this case for it is the plaintiff who claimed title to the property which was a subject-matter of the alleged sale deed of 24.2.1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the plaintiff himself failed to discharge the burden to prove that the sale deed which he executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge. The onus was clearly on the plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the defendant/appellant herein to discharge such onus.

23. The courts below thus have illegally and erroneously failed not to cast this burden on the plaintiff/respondent No. 1 by clearly misconstruing the whole case and thus resulted into recording of findings which are wholly perverse and even against the admitted case of the parties."

WHAT IS A DEED AND ITS INTERPRETATION

Justice Hariprasad of Kerala High court in case of Sivaprasad and Ors. vs. Karthiyanani and Ors.: MANU/KE/2791/2018 - ILR 2018 (4) Kerala 671 Before referring to the evidence, certain

fundamental principles regarding interpretation of deeds have to be appreciated. As per Halsbury's Laws of India, (Volume 9 - 2001 Edition, page 340) 'deed' is defined as follows: A deed is an instrument which either (1) passes an interest, right or property of itself, and creates a binding obligation on some person; or (2) amounts to an affirmation or confirmation of something which passes an interest, right or property. At common law, a deed is an instrument which complies with the following requirements:

- (a) it must be written on parchment or paper;
- (b) it must be executed in the manner specified below by some person or corporation named in the instrument; and
- (c) as to subject matter it must express that the person or corporation so named either:
 - (i) makes, confirms, concurs in, or consents to some assurance or some interest in property, or of some legal, or equitable right, title, or claim; or
 - (ii) undertakes, or enters into some obligation, duty or agreement enforceable at law, or in equity; or
 - (iii) does or concurs in some other act affecting the legal relations or position of a party to the instrument or of some other person or corporation.

Formal parts of a deed are (1) the words describing the instrument (whether conveyance, settlement, mortgage, or otherwise); (2) the date; (3) the parties' names; (4) the recitals stating the facts on which the act to be evidenced by the deed is grounded; (5) the testatum or witnessing part containing the operative words which express the parties' intention; and (6) the

testimonium stating that the parties have executed the deed in witness of what is written in it.

The testatum usually contains the following subsidiary formal parts: (a) the parcels or description of the property to be conveyed; (b) the habendum² defining the estate or interest to be taken by the alienee; (c) the trusts, if any, imposed on the person taking the legal estate under the deed; and (d) the covenants, if any, entered into by the alienor or alienee. (See Halsbury's Laws of India, same Edition, page 344).

It is a well settled rule of interpretation of the deeds that the intention of the parties must be gathered from the written instrument read in the light of such extrinsic evidence as is admissible for the purpose of construction. The function of the Court is to ascertain what the parties meant by the words they have used. It has to declare the meaning of what is written in the instrument and not what was intended to have been written. This is basically to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention. (See *Hind Plastics v. Collector of Customs* [MANU/SC/0784 /1994 : (1994) 5 SCC 167]).

The best interpretation is made from the context. The whole context must be considered to ascertain the intention of the parties. The intention of the parties to an agreement has to be gathered from the terms of the agreement construed in the context of the surroundings, antecedent and consequent circumstances. (See *Puran Singh Sahni v. Sundari Bhagwandas Kripalini* [MANU/SC/0541 /1991 : (1991) 2 SCC 180]; *Provash*

² Habendum clause means the part of an instrument, such as a deed or Will, that defines the extent of the interest being granted and any conditions affecting the grant.

Chandra Dalui v. Bishwanath Banerjee [MANU/SC/0422/1989 : AIR 1989 SC 1834].

If, however in any particular respect, the intention is clear on the whole instrument, effect will be given to that intention, even though it is not stated in express words. (See Keshav Kumar Swarup v. Flowmore Pvt. Ltd. [MANU/SC/0607/1994 : 1994 (2) SCC 10]).

A locus classicus by a Constitution Bench of the apex Court in the matter of interpretation of deeds rendered in Ramkishorelal v. Kamalnarayan [MANU/SC/0022/1962 : AIR 1963 SC 890] is to be mentioned in this context. The general principle regarding interpretation has been stated thus: The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has to a trained conveyancer a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing.

After surveying all the binding precedents, Court in **Indira Motor Service Thana & Others v. Panakkat Nazaruddin & Others** [MANU/KE/1759/2015 : 2015 (4) KLJ 357] has laid down the following principles:

12. First and foremost principle is that whenever a document is couched in a language which is clear and definite and no doubt arises in its application to the facts, there is no need to resort to the rules of interpretation. Rules of interpretation of deeds are intended to ascertain, to the extent possible, the exact meaning of a document which is not clear and definite. Many a time, language proved to be an imperfect vehicle for expressing thought and intention. The rules of interpretation or canons of constructions are the products of real life experiences of Judges and Jurists. Prime purpose of interpretation of a document is to ascertain the intention of the parties manifested at the time when the document was executed. To ascertain the intention of the parties, the document must be considered as a whole. It is from the whole of the document, coupled with the surrounding circumstances, that the general intention of the party or parties is to be ascertained. Attempt must be made to gather the intention of the parties from the exact words used in the deed. When the words used in a deed are in their literal meaning unambiguous and when such meaning is not excluded from the context and is sensible with respect to the parties at the time of executing the deed, such literal meaning must be taken. Where, the words used in a deed, if taken in its literal sense lead to absurdity and inconsistency, then an interpretation to avoid that

absurdity and inconsistency should be made. It is also a settled principle that when the intention of the maker or makers of a deed cannot be given effect to in its full extent, effect is to be given to it as far as possible. Where the intentions are sufficiently clear from the deed itself, mis-recital in some part of the deed cannot vitiate it. Anything expressly mentioned in the deed excludes another view impliedly possible.

13. As far as possible, effect is to be given to all words used in a document. This is yet another important principle in the interpretation of deeds. A document should be construed in its entirety. Further, if possible, it should be construed so as to give effect to every word employed therein. The court is not at liberty to discard a word, if some meaning can be ascribed to it. Normally, the words employed in a deed should be taken in its ordinary sense, unless there are indications to do otherwise. It is also an important rule that plain words should be given plain meaning.

In Devasironmani and another v. T. Rajathangam and another [MANU/TN/1142/1997 : 1998 (1) MLJ 322] it was held in paragraph 16: "For interpreting a document, we have to interpret the document on the words used and not by the subsequent conduct. If the parties are not getting any title, to the property on the basis of the document, a mere subsequent statement that they have obtained title on the basis of the earlier document will not create interest in them." Reliance was placed on the passages from Odgers' "Construction of Deeds and Statutes". It was further held that surrounding circumstances

may be considered for the purpose of ascertaining the intended meaning of those words, specially when there is some ambiguity in the words, used in the document. It was further held therein that if a document does not create a right 'in praesenti', the claimant could claim his right as if the said document is a Will.

In A. Sreenivasa Pai and Anr. v. Saraswathi Ammal alias G. Kamala Bai MANU/SC/0263/1985 : AIR 1985 SC 1359 , their Lordships held that 'In construing a document, whether in English or in any Indian language the fundamental rule to be adopted is to ascertain the intention from the words employed in it. The surrounding circumstances may be considered for the purpose of ascertaining the intended meaning of those words, specially when there is some ambiguity in the words used in the document'.

Supreme Court reported in **Gomtibai v. Mattulal MANU/SC/0052/1997 : [1996] 1 SCR 839** , the case was regarding partition deed between two brothers. A recital was made that they intended to gift the land to their cousin sister Kasturibai, and a subsequent correspondence also shows that the land was allotted to Kasturibai. The question before the Supreme Court was, whether the earlier intention to execute a gift and the subsequent correspondence will amount to a gift. That was a document which came into, existence at a time when the Transfer of Property Act was not in force in the State of Hyderabad. But there was a similar provision under the Hyderabad Transfer of Property Act. Considering the same, in

paragraph 4 of the judgment, their Lordships said thus: ... it is seen that the gift of immovable property should be made only for transferring the right, title and Interest by the donor to the donee by a registered instrument signed by or on behalf of the donor and must be attested by at least two witnesses. The preexisting right, title and interest of donor thereby stand divested in the donee by operation of Section 17 of the Registration Act only when the gift deed is duly registered and thereafter the donor would lose title to the property. It must also be proved that the donee had accepted the property gifted over under the instrument. In this case, though the transfer or gift was acted upon by Kasturibai as per the correspondence and evidence on record, but, admittedly, there is no written instrument executed by the donor, namely, the plaintiff and the defendant in favour of their cousin sister Kasturibai and it was got attested by at least two witnesses and registered in accordance with the provisions of the Stamp Act and the Registration Act.

Their Lordships were of the view that unless the property is legally transferred in favour of their cousin, here cannot be any question of gift though there may be a valid intention to gift.

Abdulla Ahmed v. Animendra Kissen Mitter
[MANU/SC/0013/1950 : AIR 1950 SC 15] rendered by the Constitution Bench, wherein it was held in paragraph 23 as follows: "The subsequent conduct of both the parties to the agreement very strongly supports this view. The evidence of such conduct is relevant in this case because, as pointed out by Viscount Simon, L.C., in the case already referred to, the phrase

"finding a purchaser" is itself not without ambiguity. Here the phrase is "securing a purchaser ". This phrase similarly is not without ambiguity. The evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument.

M.N. Aryamurthy and another v. M.D. Subbaraya Setty [MANU/SC/0479/1971 : AIR 1972 SC 1279] rendered by a three Judge Bench, has argued that Ext. A1 cannot be considered as a family settlement. It was held in paragraph 10 of the decision noted supra, that: "As pointed out in Halsbury's Laws of England, 3rd Edition, Vol. 17, at p. 215: A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour." The aforesaid view in relation to family settlement had been originally formed by the Apex Court in *Maturi Pullaiah and another v. Maturi Narasimham and others* [MANU/SC/0328/1966 : AIR 1966 SC 1836]. "It will be, therefore, seen that, in the first place, there must be an agreement amongst the various members of the family intended to be generally and reasonably for the

benefit of the family. Secondly, the agreement should be with the object either of compromising doubtful or disputed rights, or for preserving the family property, or the peace and security of the family by avoiding litigation, or for saving its honour. Thirdly, being an agreement, there is consideration for the same, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and goodwill amongst the relations."

In K.H. Krishna Iyer and others v. Parvathy Ammal and others [MANU/KE/0378/1988 : 1988 (2) KLJ 156], Court had occasion to consider the parameters, which can bring a document in the category of a family arrangement. In order to bring out a document within the scope of family arrangement, it was held that - "..... the essential requirements are (1) there must be agreement among the various members intended generally and reasonably for the benefit of the family, (2) the agreement must be with the object of compromising doubtful or disputed claims or rights for preserving the family property or for purchasing peace and security of the family by avoiding litigation or saving its honour and (3) there is consideration which could be the expectation that the arrangement will result in establishing or ensuring amity or goodwill among the relations. It must be an arrangement that comes into existence in presente."

In **Rajammal alias Sundarammal and others [MANU/PR/0023/1944 : AIR 1945 PC 82]**, it was held:- "It is settled that mere attestation is not enough to involve the

witnesses with knowledge of the contents of the deed, and this is equally true of the witnesses who identify the executant before the Registrar."

In Torabaz Khan and another v. Nanak Chand and another [MANU/LA/0154/1932 : AIR 1932 Lahore 566], it was held:-

"It is true that, merely by signing a document as an attesting witness, a person cannot be said to have knowledge of its contents, but there may be circumstances when he would be deemed to have notice of the contents of the document which he is attesting and signing as a witness."

State of Kerala v. M.A. Babu and another [MANU/KE/0165/2003 : 2003 (2) KLJ 299], wherein it was

held:- "But then one cannot be unmindful of the realities of everyday life that when the son functions as attesor to a document executed by his own old, sick and infirm father, the son may be playing a major role in the matter of arranging for the sale identifying the purchaser and even negotiating as to what should be the consideration for the sale. Attestor to a document cannot by mere attestation be imputed with the knowledge of the contents of the document. However, on the facts of a given case where there is a close relationship between the executant and the attestor such as husband and wife, father and son, the possibilities of the attestor having knowledge regarding the recitals in the documents and about the circumstances under which the document came to be executed cannot be ruled out. Under the order of clarification I permitted the petitioner to

examine the son of the executant, an attester to the document as a substitute for his father only because of the submission that the son is competent to speak about the circumstances under which the document was executed."

PARTY SHALL PUT HIS CASE IN CROSS EXAMINATION

Sarwan Singh vs. State of Punjab-MANU/SC/0868/2002 : (2003) 1 SCC 240, certain extracts from paragraph No. 9 of the judgment would run thus: "9. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted.. . . ."

S. Deivanai and others vs. V.M. Kothandaraman-MANU/TN/1897/2017 : 2017(4) CTC 734, certain extracts from paragraph No. 39 would run thus: "39. From a perusal of the materials on record, we are of the opinion that the defendants have not denied the case of the plaintiff by putting suggestion in the cross-examination of P.W. 1. Failure to cross-examine on this aspect has resulted in establishment of the fact by the plaintiff that the plaintiff has proved that he was ready and willing to perform his part of the contract"

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CHAPTER RELIEF AND COSTS

RIGHT OF A PARTY IS DETERMINED BY THE FACTS AS THEY EXIST ON THE DATE THE ACTION IS INSTITUTED

In P. Venkateswarlu v. Motor & General Traders (1975) 1 SCC 770, 772 : AIR 1975 SC 1409, 1410] Court dealt with the adjectival activism relating to post-institution circumstances. Two propositions were laid down. Firstly, it was held that [SCC p. 772, para 4] 'it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding.' This is an emphatic statement that the right of a party is determined by the facts as they exist on the date the action is instituted. Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right because, as explained

earlier, had the court found his facts to be true the day he sued he would have got his decree. The Court's procedural delays cannot deprive him of legal justice or rights crystallised in the initial cause of action.

Court in the case of **Jayamma vs. The Asst. Revenue Officer & Others** **ILR 2009 KAR 458** and has submitted that despite pendency of the civil suits, the learned single Judge of this Court upheld the change of 'Khata' entries in favour of the plaintiffs who challenged the Gift Deeds in favour of the defendants and the Court upheld the restoration of the 'Khata' entries in favour of the plaintiffs subject to the decision of the said suits.

WHETHER COURT IS COMPETENT TO GRANT ALTERNATIVE RELIEF WHICH IS NOT EXPRESSLY PRAYED FOR

The court is competent to grant alternative relief which is not expressly prayed for as held by this Court in Gorilal Baldev Das Vs. Ramjilal Bhuralal AIR 1961 MP 346. It is further argued that in case law Smt. Neelawwa Vs. Smt. Shivawwa AIR 1989 Karnatak 45, the plaintiff brought a suit for declaration of title and injunction claiming half share in the suit land. Hon'ble High Court has granted him relief of partition and separate possession even in absence of specific prayer for such relief.

Hon'ble Supreme Court in the case of **Bachhaj Nahar vs. Nilima Mandal**, **[MANU/SC/8199/2008 : (2008) 17 SCC 491]**, wherein, it has been observed as under-

"(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal."

In Bachhaj Nahar's case referred to supra the Apex Court has dealt with the requirements of the pleadings in cases relating to the right of easement. The relevant paragraphs are extracted below:

"19. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right to drainage, right to a water course, etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.

The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an

easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit.) He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and the defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to watercourse. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

21. A right of easement can be declared only when the servient owner is a party to the suit. But nowhere in the plaint, the plaintiffs allege, and nowhere in the judgment,.....

23. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel,

acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc."

COURTS FINDING OF FACTS

In Jagdish Singh v. Natthu Singh, AIR 1992 SC 1604 it has been held by the Hon'ble Supreme Court that where the finding by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings.

In Kashibai v. Parwatibai (1995) 6 SCC 213 : (1995 AIR SCW 4631). it has been held by the Hon'ble Supreme Court that High Court cannot reappreciate the evidence and interfere with the concurrent findings of fact of courts below without even formulating any question of law. The High Court has no jurisdiction to entertain a second appeal on ground of erroneous findings of fact, based on appreciation of relevant evidence.

In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, AIR 1999 SC 2213, the Hon'ble Supreme Court has held that concurrent findings of fact, howsoever erroneous, cannot be disturbed by the High Court in exercise of powers under Section 100, C.P.C.

In Roop Singh v. Ram Singh, 2000 AIR SCW 1001 : (AIR 2000 SC 1485), it has been held by the Hon'ble Supreme Court that under Section 100 of the C. P. C., jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100, C. P. C.

SECTION 34 OF THE SPECIFIC RELIEF ACT, 1963

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J.,

43. The Section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.

44. In Ram Saran & Anr. v. Smt. Ganga Devi, AIR 1972 SC 2685, this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of Specific Relief Act,

1963 (hereinafter called 'Specific Relief Act') and, thus, not maintainable.

45. In *Vinay Krishna v. Keshav Chandra & Anr.*, AIR 1993 SC 957, this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. (See also: *Gian Kaur v. Raghubir Singh*, (2011) 4 SCC 567).

46. In view of above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief. In the instant case, suit for declaration of title of ownership had been filed though, the plaintiff/respondent no. 1 was admittedly not in possession of the suit property. Thus, the suit was barred by the provision of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same.

PARTY CANNOT BE GRANTED RELIEF WHICH IS NOT CLAIMED

Om Prakash vs. Ram Kumar [(1991) 1 SCC 441], this Court observed, "A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the

interested party and deprive him of the valuable rights under the statute".

PERSON CANNOT SUFFER OWING TO INACTION OF THE COURT

Even otherwise it is now well-settled that a person cannot be made to suffer owing to an action by the Court. (*Actus curiae neminem gravabit*) [Ram Chandra Singh Vs. Savitri Devi and Ors., **(2003) 8 SCC 319** and Board of Control For Cricket in India and Another Vs. Netaji Cricket Club and Others [(2005) 4 SCC 741]

Even otherwise it is now well-settled that a person cannot be made to suffer owing to in-action by the Court. (***Actus curiae neminem gravabit***) [Ram Chandra Singh Vs. Savitri Devi and Ors., **(2003) 8 SCC 319** and Board of Control For Cricket in India and Another Vs. Netaji Cricket Club and Others [(2005) 4 SCC 741]

WRONG PROVISION OF LAW DOES NOT VITIATE ORDER – IF SUCH ORDER IS WITHIN THE POWER OF AUTHORITY

The Hon'ble Supreme Court in the case of the Vice-Chancellor, Jamu University and another V. Dushinant Kumar Rampal, AIR 1977 SC 1146 held that when an authority makes an order which is otherwise within its competence, it cannot fail merely

because it purports to be made under a wrong provision of law, if it can under any other provision; a wrong label cannot vitiate an order which is otherwise within the power of the authority to make.

WHEN IDENTIFICATION OF PROPERTY IS IN DISPUTE NO RELIEF BE GRANTED

JUSTICE R Gururajan of Karnataka High Court in the case of **T.L. Nagendra Babu vs Manohar Rao Pawar reported in ILR 2005 KAR 884**

1. Pleadings should be verified by the party who is acquainted with the facts of the case - A party must also specify the number of paragraphs and his knowledge, information and belief with regard to the paragraphs - Verification must be signed by the concerned party by mentioning the date and place.
2. Presumption operates in favour of the party relying on a document, provided he must prove that the document is duly executed and authenticated.
3. Unless the Court is satisfied with regard to material details in the light of the material evidence with regard to the identification of the property, no declaration and injunction can be granted.
4. There is no proper evidence with regard to maintainability of the suit; there is no proper evidence with regard to court fee; there is no proper evidence with regard to cause of action; there

is no evidence with regard to possession, but despite the same, the learned Judge has chosen to grant an injunction relief in the case on hand. Grant of injunction is serious in nature. It affects the rights of the parties. The Court must be very careful in evaluating the pleadings and evidence in the matter of injunction.

COURTS TO BE REALISTIC IN IMPOSING COSTS

In Ramrameshwari Devi v. Nirmala Devi, (2011) 8 SCC 249, the Supreme Court has held that the Courts have to take into consideration pragmatic realities and have to be realistic in imposing the costs. The relevant paragraphs of the said judgment are reproduced hereunder:- "45. ...We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases."

NEW CREED OF LITIGANTS HAVE CROPPED UP - WHO DO NOT HAVE ANY RESPECT FOR TRUTH - RESORTING TO FALSEHOOD AND UNETHICAL MEANS FOR ACHIEVING THEIR GOALS

In *Dalip Singh v. State of U.P.*, (2010) 2 SCC 114, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post- Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

THE COURTS CAN TAKE NOTICE OF THE SUBSEQUENT EVENTS AND CAN MOULD THE RELIEF ACCORDINGLY

In **Rajesh D. Darbar and Ors. v. Narasingrao Krishnaji Kulkarni and Ors., (2003) 7 SCC 219** this court noticed: "The courts can take notice of the subsequent events and can mould the relief accordingly. But there is a rider to these well established principles. This can be done only in exceptional circumstances, some of which have been highlighted above. This equitable principle cannot, however, stand on the way of the court adjudicating the rights already vested by a statute. This well settled position need not detain us, when the second point urged by the appellants is focused. There can be no quarrel with the proposition as noted by the High Court that a party cannot be made to suffer on account of an act of the Court. There is a well recognised maxim of equity, namely, *actus curiae neminem gravabit* which means an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, *lex non cogit ad impossibilia*, i.e. the law does not compel a man to do that what he cannot possibly perform.

In Pratap Rai Tanwani Vs. Uttam Chand (2004 (8) SCC 490), Supreme Court held that subsequent developments can be taken into consideration to afford relief to the parties, provided only when such developments had a material impact on those rights and obligations.

In Ramesh Kumar Vs. Kesho Ram [1992 Supp. (2) SCC 623

where Court observed as follows : - "The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a `cautious cognizance of the subsequent changes of fact and law to mould the relief."

In Gulabbai vs. Nalin Narsi Vohra {1991 (3) SCC 483}, the

Supreme Court referred to its various earlier decisions and held in para 25 that it is beyond the pale of any doubt that in appropriate cases, events subsequent to the filing of the suit can be taken notice of and can be duly considered provided the same are relevant.

Om Prakash Gupta vs. Ranbir B. Goyal {2002 (2) SCC 256},

the Supreme Court in para 11 held as follows:- "11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied:

- (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;
- (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and
- (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise."

COURT CANNOT IMPOSE COSTS EXCEEDING ITS LIMITS UNDER CPC AND ALSO IT CANNOT DIRECT THE COSTS TO BE PAID TO LEGAL SERVICES AUTHORITY

The Hon'ble Supreme court of India in **ASHOK KUMAR MITTAL VS. RAM KUMAR GUPTA & ANR. 2009(1) SCALE 321** , Justice R V Raveendran, Justice J M Panchal, New Delhi; January 9, 2009 "Exemplary costs - Imposition of - Courts should not exceed the limitations placed by CPC in this regard - Principles and practice relating to administrative law matters cannot be imported mechanically to civil litigation governed by the Code - Levy of huge costs in selected matters made payable to legal Services Authorities or non-party charitable organizations should be avoided - As regards the costs, courts should not exceed or overlook the limitations placed by the Code of Civil Procedure, 1908 with reference to costs in civil litigation. The principles and practices relating to levy of costs in administrative law matters cannot be imported mechanically in relation to civil

litigation governed by the Code. On the aspect of the recipient of the costs, once the High Court held that costs had to be paid to the State, it should not have directed payment of the costs to the High Court Legal Services Committee, which being a statutory authority under the Legal Services Authorities Act, 1987, is not the 'State' that spends money on providing judicial infrastructure. Levy of huge amounts as costs in selected cases, made payable to Legal Services Authorities, may invite adverse comments and evoke hostility to legal services in general. The Court has also come across cases of costs being levied and made payable to some non-party charitable organizations. Levy of such costs should be avoided.”

ADJOURNMENT AND COSTS - ACTUAL COST THAT HAD TO BE INCURRED BY THE OTHER PARTY SHALL BE AWARDED WHERE THE ADJOURNMENT IS FOUND TO BE AVOIDED

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The awarding of cost under Order XVII Rule 1(2) has been made mandatory. Costs that can be awarded are of two types. First, cost occasioned by the adjournment and second such higher cost as the Court deems fit. The provision for costs and higher costs has been made because of practice having been developed to award only a nominal cost even then adjournment on payment of costs is granted. Ordinarily, where the costs or

higher costs are awarded, the same should be realistic and as far as possible actual cost that had to be incurred by the other party shall be awarded where the adjournment is found to be avoided but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason.

The provisos to Order XVII Rule 1 and Order XVII Rule 2 have to be read together. So read, Order XVII does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on the number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments as provided in proviso to Order XVII Rule 1.

In some extreme case, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (take the example of Bhopal Gas Tragedy, Gujarat earthquake and riots, devastation on account of Tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the Court would decide to grant or refuse adjournment.

Further, to save the proviso to Order XVII Rule 1 from the vice of Article 14 of the Constitution it is necessary to read it down so as not to take away the discretion of the Court in the extreme hard cases as noted above. The limitation of three adjournments would not apply where adjournment is to be granted on account of circumstances beyond the control of a party. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the Court by resorting to the provision of higher cost which can also include punitive cost in the discretion of the Court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case.

However, grant of any adjournment let alone first, second or third adjournment is not a right of a party. The grant of adjournment by a Court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering the prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict grant of adjournments.

PROVISION OF COSTS INTEND TO ACHIEVE FOLLOWING GOALS

The provision for costs is intended to achieve the following goals:

Vinod Seth vs. Devinder Bajaj and Ors.:
MANU/SC/0424/2010

(a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.

(b) Costs should ensure that the provisions of the Code, Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court.

(c) Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

(d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

(e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bonafide

claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.

The English civil procedure rules provide that a court in deciding what order, if any, to make in exercising its discretion about costs should have regard to the following circumstances:

- (a) the conduct of all the parties;
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
- (c) any payment made into court or admissible offer to settle made by a party which is drawn to the courts attention.

'Conduct of the parties' that should be taken note by the court includes:

- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the relevant pre-action protocol;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
- (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

Similar provisions, with appropriate modifications may enable proper and more realistic costs being awarded. The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the pendency or encourage alternative

dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to re-visit the provisions relating to costs and compensatory costs contained in Section 35 and 35A of the Code.

WHEN COURT HAS BEEN GIVEN A CERTAIN AMOUNT OF LATITUDE IN THE MATTER OF PROCEDURE, IT SURELY CANNOT FLY AWAY FROM ESTABLISHED LEGAL PRINCIPLES WHILE DECIDING THE CASES BEFORE IT

In *Standard Chartered Bank v. Andhra Bank Financial Services Ltd. & Ors.*, (2006) 6 SCC 94, Court while dealing with a case under the provisions of Companies Act, 1956, while considering complex issues regarding the Markets, Exchanges and Securities, and the procedure to be followed by special Tribunals, held as under : “While it may be true that the Special Court has been given a certain amount of latitude in the matter of procedure, it surely cannot fly away from established legal principles while deciding the cases before it. As to what inference arises from a document, is always a matter of evidence unless the document is self-explanatory.....In the absence of any such explanation, it was not open to the Special Court to come up with its own explanations and decide the fate of the suit on the basis of its inference based on such assumed explanations.”

IF THE APPLICATION IS FOUND TO BE MISCHIEVOUS, OR FRIVOLOUS, OR TO COVER UP NEGLIGENCE OR LACUNAE, IT SHOULD BE REJECTED WITH HEAVY COSTS

THE HONBLE JUSTICE P. SATHASIVAM & THE HONBLE JUSTICE JAGDISH SINGH KHEHAR of Supreme Court of India in the case of M/S Bagai Construction vs M/S Gupta Building Material Store Decided on 22 February, 2013 in CIVIL APPEAL NO. 1787 OF 2013 it is held that “If we apply the principles enunciated in the Vadiraj Naggappa Vernekar (dead) through LRs. vs. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410 and the limitation as explained with regard to the application under Order XVIII Rule 17, the applications filed by the plaintiff have to be rejected.” The following principles laid down in K.K. Velusamy vs. N. Palanisamy, (2011) 11 SCC 275, are relevant: “19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay.

Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.”

PROCEDURAL DEFECTS WHICH DO NOT GO TO THE ROOT OF THE MATTER SHOULD NOT BE PERMITTED TO DEFEAT A JUST CAUSE

Supreme Court in United Bank of India v. Naresh Kumar and Others (AIR 1997 SC 3) held that procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the court under the Code of Civil Procedure to ensure that injustice is not done to any parties who has a just cause. The original of the power of attorney is subsequently produced in this court and according to me the contention on the question of maintainability - that the suit is not maintainable due to the non competence of the signatory to the plaint cannot any longer survive.

NO APPLICATION CAN BE FILED AFTER THE FINAL ARGUMENTS HAVE BEEN HEARD AND THE MATTER IS POSTED FOR JUDGMENT

Rabiya Bi Kassim M. vs The Country Wide Consumer ... on 5 April, 2004

Equivalent citations: ILR 2004 KAR 2215, 2004 (4) KarLJ 189

Author: N Jain

Bench: N Jain, V Sabhahit

In the facts of the given case, sufficient opportunity was given to the plaintiff to complete his evidence, but he has not availed the opportunity at appropriate time and thereafter his evidence was closed. The case was fixed for defendant's evidence and ultimately the case was heard and reserved for judgment on 20.6.2001. In our view, if the matter is reserved for pronouncement of judgment, such an application is not maintainable as otherwise it will defeat the very object of amendment in speedy disposal of the cases.

RELIEF AS TO DELIVERY AND CANCELLATION OF AN INSTRUMENT

Dunia Lal Datta vs Nagendra Nath Datta And Anr. AIR 1982 Cal 163 The relief as to delivery and cancellation of an instrument is founded upon the administration of the protective justice for fear that the instrument may be vexatiously or injuriously used by the defendant against the plaintiff or it may throw a cloud or suspicion over his title or interest. A plaintiff in a suit under Section 31 of the Act has to establish three conditions :

- (1) that the plaintiff is such a person against whom the instrument is void or voidable.
- (2) that the plaintiff can entertain a reasonable apprehension that if such an instrument is left outstanding it may cause him serious injury.
- (3) that the Court must adjudge the instrument void or voidable.

SUIT FOR CANCELLATION OF DEED OR SUIT FOR SEEKING DEED AS NOT BINDING DIFFERENCE

In Vellayya Konar v. Ramaswami Kdnar AIR 1939 Madras 894, it was held that there is a difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding upon the plaintiff. When plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void in toto and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled in toto. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore, in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed.

WHETHER AN INSTRUMENT CAN BE SAID TO BE VOID OR VOIDABLE AGAINST A PERSON

**JUSTICE P.S. Narayana, in Tekulapally Veera Reddy And Ors.
vs Tekulapally Narayana Reddy AIR 2008 AP 60,**

The question whether an instrument can be said to be void or voidable against a person claiming relief under the aforesaid provision came to be considered by a Full Bench of the Madras High Court in the case of the Muppudathi Pillai v. Krishnaswami Pillai AIR 1960 Mad 1 (FB). At P. 4 it was observed:

...It stands to reason that the executant of the document should be either the plaintiff or a person who can in certain circumstances bind him. It is only then it could be said that the instrument is voidable by or void against him. The second aspect of the matter emphasizes that principle. For there can be no apprehension if a mere third party, asserting a hostile title creates a document. Thus relief under Section 39 would be granted only in respect of an instrument likely to affect the title of the plaintiff and not of an instrument executed by a stranger to that title.

Proceeding with the discussion their Lordships pointed out the example of a trespasser purporting to convey the property in his own right and not in the right of the owner. In such a case to my mind agreeing with respect with their Lordships of the Madras High Court, the remedy of cancellation of such an instrument cannot be granted because such a relief would not remove the cloud upon his title by the instrument and the proper remedy to seek is a declaration of his own title or a declaration that the sale deed is not binding or valid against him. It is only in the case of instruments which are either executed by a party or which

purport to have been executed by a party or by a person who can bind him that the relief under Section 31 can be claimed in law because in such cases only can it be said, as observed by the Madras High Court also in the said case, "that there is a cloud on his title and an apprehension that if the instrument is left outstanding it may be a source of danger". They went on further to illustrate the point by observing that such cases may arise in the following circumstances : "A party executing the document, or a principal in respect of a document executed by his agent, or a minor in respect of a document executed by his guardian de jure or de facto, a reversioner in respect of a document executed by the holder of a limited estate, in respect of a document executed by the benamidar etc." Courts have also recognised in this respect the right to challenge and to pray for cancellation of a forged document which is purported to have been executed on his behalf. In all these cases there is no question of a document by a stranger to the title as in the present case and it can further be found that in all such cases a reasonable apprehension can be entertained that if such an instrument is left outstanding the same may cause the plaintiff serious injury. In the present case it cannot be successfully maintained that a reasonable apprehension can be entertained by the plaintiffs that if the sale deed is left outstanding it may cast a cloud upon their title or cause them serious injury because the cloud upon their title will not be removed merely by a decree for cancellation of the instrument. The cloud will continue to hang over the plaintiffs by the hostile assertion of title by the executant of the sale deed and those who claim a title to it. Therefore, the proper relief for the

plaintiffs to seek in a case of this kind is a declaration of their own title or a declaration that the executant of the sale deed in dispute has no title to the property.

SHAM TRANSACTIONS ALLEGATIONS NEEDS ADJUDICATION TO CANCEL IT

A Full Bench of the Orissa High Court in Keshab Chandra Nayak v. Laxmidhar Nayak and Others AIR 1993 Orissa 1, which was a case dealing in benami transactions, taking the same view that Section 31 of the Specific Relief Act could be called into aid by a person who was not a party to the agreement, held that in certain circumstances, "even a sham transaction can also be treated as voidable at the instance of some persons and these persons may approach the appropriate authority for getting it so adjudged and for its cancellation, as permitted by Section 31 of the Specific Relief Act, 1963."

WHETHER RECTIFICATION OF DOCUMENT RELIEF CAN BE ASKED BY WAY OF AMENDMENT

Madras High Court in Raipur Manufacturing Co. Ltd. v. Joolaganti Venkatasubba Rao Veerasamy & Co., AIR 1921 Mad 664, wherein it was held that where in the course of a suit for damages for breach of contract, the plaintiff contends that there is a clerical error in the document embodying the contract, it is not always necessary that a separate suit should have been brought for rectification of the document and it is open to the

court in a proper case to allow the plaintiff to amend the plaint and ask for the necessary rectification.

In Subhadra & Ors. v. Thankam AIR 2010 SC 3031, Court while deciding upon whether the agreement suffers from any ambiguity and whether rectification is needed, held that when the description of the entire property has been given and in the face of the matters being beyond ambiguity, the question of rectification in terms of Section 26 of the Act would, thus, not arise. The provisions of Section 26 of the Act would be attracted in limited cases. The provisions of this Section do not have a general application. These provisions can be attracted in the cases only where the ingredients stated in the Section are satisfied. The relief of rectification can be claimed where it is through fraud or a mutual mistake of the parties that real intention of the parties is not expressed in relation to an instrument.

Court in State of Karnataka & Anr. v. K. K. Mohandas & etc, AIR 2007 SC 2917 Under Section 26 of the Specific Relief Act, an instrument or contract may be rectified when through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not express their real intention. According to Dr. Banerjee in his Tagore Law Lectures on the, Law of Specific Relief, if the parties had deliberately left out something from the written instrument, that cannot be put in, by resort to the remedy of rectification. Here, the parties have entered into written contracts and admittedly no term is incorporated therein

regarding enforcement of the ban on trade of toddy to the public in the District of Dakshina Kannada. Nor is there any case pleaded in the plaint of any mutual mistake in the matter of setting down the terms of the contract. There is also no plea of fraud on the part of the State in entering into the contract. On the terms of the contract, the plaintiffs had obtained the right to vend arrack for the Excise Year 1990-91 on their obligation to pay the bid amount in monthly instalments. In the absence of any foundation in the pleadings being laid by the plaintiffs establishing a ground for the grant of the relief of rectification, the mere adding of a prayer by way of an amendment could not be considered sufficient to grant them the relief of rectification.

In the High court of Karnataka by Justice K.Bhakthavatsala, in the case of Fakkirawwa vs Ashok Decided on 18 July, 2014, WRIT PETITION NO.76686 & 76687/2013 Chapter-III of the Specific Relief Act, 1963 deals with regard to rectification of instruments in the event of fraud or mutual mistake of the parties mentioned therein. As per sub-Section (2) of Section 26, if, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention. Further, sub-Section (3) of Section 26 says that a contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced. The above-said

provision does not permit the plaintiff, who has filed a Suit for specific performance of agreement to seek direction to the defendants to amend the Sy. No.63/A/2 instead of Sy. No.63/2A in the agreement of sale. It is pertinent to mention that if the case of the plaintiff is that there is mistake in mentioning correct survey number in the agreement of sale, it is open to the plaintiff to plead the same in the plaint or seek amendment of the plaint for such a relief in the suit by urging the grounds, but the above-said provision does not give any such right to the plaintiff to seek rectification of the instrument viz., the agreement of sale by filing an application under Order VI Rule 17 of CPC.

In Hutchegowda v. Chennigegowda AIR 1953 Mys. 49, the following view was taken by a Division Bench: "Evidence that a document was duly registered is some evidence of its execution by the person by whom it purports to have been executed."?

IF COURT UNABLE TO CONCLUDE WHETHER VERSION OF PLAINTIFF OR DEFENDANT AS TRUE IT WILL BE PLAINTIFF'S FAILURE 1987 KARHC

Krishne Gowda vs. Ningegowda: MANU/KA/0233/1987the burden of adducing evidence is not constant and it shifts as the case continues to develop. When once the entire evidence is adduced and on the entire evidence on record the Court is able to come to the conclusion that the case pleaded by the plaintiff is established, it will be a case for holding that the plaintiff has discharged his burden. On the contrary, if the Court

is not able to come to a definite conclusion as to which version, i e., either of the plaintiff or of the defendant, is true, in such an event, as the burden of proof on the pleading is on the plaintiff, it will be a case where the plaintiff has failed to prove the case pleaded by him and thereby he has failed to discharge the burden of proof.

A PARTY WHO WANTS EQUITABLE RELIEF OF SPECIFIC PERFORMANCE MUST COME WITH CLEAN HANDS TO COURT 2013 KARHC

Smt. Shantha Kumari vs. Sri. V.N. Satyanarayana:
MANU/KA/2593/2013

In Lourdu Mari David and Ors. vs. Louis Chinnaya Arogiaswamy and Ors. reported in (1996) 5 SCC 589 Court observed: "2. It is settled law that the party who seeks to avail of the equitable jurisdiction of a court and specific performance being equitable relief, must come to the court with clean hands. In other words the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief."

In Lalit Kumar Jain and Anr. vs. Jaipur Traders Corporation Pvt. Ltd. reported in (2002) 5 SCC 383 Court observed: "9. We are of the view that the High Court failed to address itself to certain crucial factors which disentitles the plaintiff to equitable relief. The High Court reversed a well-considered judgment of the

trial court without adverting to the reasoning of the trial court except in a cursory manner. In the view we are taking, it is not necessary for us to dilate on various legal issues debated before us. We shall proceed on the basis that in law the plaintiff could annul the contract of sale before the act of registration got completed and title passed to the appellants. We shall further assume that the plaintiff in fact rescinded the contract with effect from the date of expiry of the time stipulated in the fourth and final notice dated 3-7-1973. If such rescission or termination of contract is not justifiable on facts or having regard to the conduct of the plaintiff, the equitable relief under Section 27 or 31 of the Specific Relief Act has to be denied to the plaintiff, no further question arises for consideration. In such a case, the appellants' plea has to be accepted and the suit is liable to be dismissed."

RELIEF NOT FOUNDED ON THE PLEADINGS SHOULD NOT BE GRANTED

National Textile Corporation Limited vs. Naresh Kumar Badrikumar Jagad and Ors., (2011) 12 SCC 695, the Supreme Court held as hereunder:

"12. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the

question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide *Trojan & Co. v. Nagappa Chettiar* [AIR 1953 SC 235] , *State of Maharashtra v. Hindustan Construction Co. Ltd.* [(2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207 : AIR 2010 SC 1299] and *Kalyan Singh Chouhan v. C.P. Joshi* [(2011) 11 SCC 786 : (2011) 4 SCC (Civ) 656 : AIR 2011 SC 1127] .)

Bachhaj Nahar vs. Nilima Mandal and Anr (2008) 17 SCC 491

"23. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like *res judicata*, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil

suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc."

Bachhraj Nahar vs. Nilima Mandal & Others; AIR 2009 SC 1103 wherein it has been observed as under :- "12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on

that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto."

PRAGMATIC REALITIES AND HAVE TO BE REALISTIC IN IMPOSING THE COSTS

In Ramrameshwari Devi v. Nirmala Devi, (2011) 8 SCC 249, the Supreme Court has held that the Courts have to take into consideration pragmatic realities and have to be realistic in imposing the costs. The relevant paragraphs of the said judgment are reproduced hereunder:-We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy

costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.The other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts for the last 40 years.On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation.

In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (2012) 5 SCC 370, the Supreme Court held that heavy costs and prosecution should be ordered in cases of false claims and defences as under:- This Court in a recent judgment in Ramrameshwari Devi (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation.The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

In Subrata Roy Sahara v. Union of India (2014) 8 SCC 470, the Supreme Court again held that costs must be imposed on frivolous litigation: The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to

deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault?

TO WHAT EXTENT RELIEF NOT CLAIMED BE GRANTED

Justice Sanjay K Arawal of Chhattisgarh High Court in case of Dewarin Bai and Ors. vs. Dukhu Ram and Ors.: reported in MANU/CG/0967/2019, has discussed on the point with citations and clarified

The Supreme Court in the matter of **Om Prakash and Ors. v. Ram Kumar and Ors. MANU/SC/0101/1991 : (1991) 1 SCC 441**, has clearly held that a party cannot be granted a relief, which is not claimed, if the circumstances are such that granting such relief would result in serious prejudice to the interested party and deprive him of valuable rights under the statute. In reference to Order 7 Rule 7 of the CPC, it has further been held that plaintiff cannot base new cause of action on plea of

defendant unless he amends the plaint or files separate proceedings.

In the matter of **Satish Chand Makhan and Ors. v. Govardhan Das Byas and Ors. MANU/SC/ 0691/1998 : (1984) 1 SCC 369**, the Supreme Court has held that ordinarily a suit is tried in all its stages on the cause of action as it existed on the date of the institution, but the Court can look to subsequent events, when the relief claimed originally has (1) by reason of subsequent change of circumstances become inappropriate, or (2) where it is necessary to take notice of the changed circumstances to shorten litigation, or (3) to do complete justice between the parties.

Furthermore, in the matter of **Ganesh Shet v. Dr. C.S.G.K. Setty and Ors. MANU/SC/0383/1998 : (1998) 5 SCC 381**, Their Lordships of the Supreme Court have held that under Order 7 Rule 7 of the CPC, the general or other relief, the Court may deem fit, sought by plaintiff can be granted only when it is consistent with the pleading as well as proof.

In **Om Prakash Gupta v. Ranbir B. Goyal MANU/SC/0035/2002 : (2002) 2 SCC 256**, the Supreme Court has clearly held that subsequent events can be taken cognizance can be taken cognizance of only if Court's attention is invited towards them according to established rules of procedure so that the prerequisites of affording the opposite party an opportunity of meeting the new case and of determining the real questions in controversy are fulfilled by holding the following:- "11. The

ordinary rule of civil law is that the rights of the parties stand crystalised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied :

- (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;
- (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties;
- (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise.

In Pasupuleti Venkateswarlu Vs. The Motor & General Traders - MANU/SC/0415/1975 : AIR 1975 SC 1409 Court held that a fact arising after the lis, coming to the notice of the Court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the Court cannot be blinked at. The Court may in such cases bend the rules of procedure if no specific provision of law or rule of fairplay is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The court speaking through Krishna Iyer, J. affirmed the proposition that court can, so long as the litigation pendse, take note of updated facts to promote substantial justice. However, the court cautioned: (i) the event should be one as

would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fairplay is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautions, and (iv) the rules of fairness to both sides should be scrupulously obeyed.

..... Such subsequent event may be one purely of law or founded on facts. In the former case, the Court may take judicial notice of the event and before acting thereon put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bring it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 of the CPC. Such subsequent event the Court may permit being introduced into the pleadings by way of amendment as it would be necessary to do so for the purpose of determining real questions in controversy between the parties.

In Messrs. Trojan & Co. Vs. RM. N.N. Nagappa Chettiar - MANU/SC/0005/1953 : AIR 1953 SC 235 Court has held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found; without the amendment of the pleadings the Court would not be entitled to modify or alter the relief.

In Sri Mahant Govind Rao Vs. Sita Ram Kesho & Ors. - MANU/PR/0028/1898 : (1898) 25 Indian Appeals 195 (PC),

their Lordships observed that, as a rule, relief not founded on the pleadings should not be granted.

Power of the Court to take note of subsequent events, specially at the appellate stage, came up for the consideration of a Full Bench of Nagpur High Court presided over by Justice Sinha (as His Lordship then was) in **Chhote Khan Vs. Mohammad Obedulla Khan**, **MANU/NA/0115/1953 : AIR 1953 Nag 361**.

Hidayatullah, J. (as His Lordship then was) held, on a review of judicial opinion, that an action must be tried in all its stages on the cause of action as it existed at the commencement of the action. No doubt, Courts 'can' and sometimes 'must' take notice of subsequent events, but that is done merely 'inter partes' to shorten litigation but not to give to a defendant an advantage because a third party has acquired the right and title of the plaintiff. The doctrine itself is of an exceptional character only to be used in very special circumstances. It is all the more strictly applied in those cases where there is a judgment under appeal. His Lordship quoted the statement of law made by Sir Asutosh Mookerjee, J. in a series of cases that merely because the plaintiff loses his title 'pendente lite' is no reason for allowing his adversary to win if the corresponding right has not vested in the adversary but in a third party."

The legal principle laid down in **Om Prakash Gupta v. Ranbir B. Goyal** **MANU/SC/0035/2002 : (2002) 2 SCC 256** has consistently been followed by the Supreme Court in *Ram Nibas Gagar (dead) by Lrs. v. Debojyoti Das and Ors.* **MANU/SC/1123/2002 : (2003) 1 SCC 472**, *Ram Kumar Barnwal*

v. Ram Lakhan (dead) MANU/SC/7670/2007 : (2007) 5 SCC 660, and Nidhi v. Ramkripal Sharma (dead) through Lrs. MANU/SC/0133/2017 : (2017) 5 SCC 640.

Hon'ble Supreme Court in the case of Bachhaj Nahar v. Nilima Mandal & another, reported in MANU/SC/8199/2008 : (2008) 17 SCC 491.

Paragraphs 13, 14 and 15 of the said judgment are quoted herein below:

"13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant

has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

14. The High Court has ignored the aforesaid principles relating to the object and necessity of pleadings. Even though right of easement was not pleaded or claimed by the plaintiffs, and even though parties were at issue only in regard to title and possession, it made out for the first time in second appeal, a case of easement and granted relief based on an easementary right. For this purpose, it relied upon the following observations of this Court in **Nedunuri Kameswaramma v. Sampati Subba Rao: AIR 1963 SC 884** "6. No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion."

..... **But the said observations were made in the context of absence of an issue, and not absence of pleadings.**

15. **The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in Bhagwati**

Prasad v. Chandramaul: (AIR 1966 SC 735) "10. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

RELIEF TO PROPERTY WHICH IS IDENTIFIABLE

Nahar Singh vs. Harnak Singh and Others-
MANU/SC/1295/1996 : (1996) 6 Supreme Court Cases 699,

certain extracts from paragraph No. 6 of the judgment would run thus: "6 It is well settled that unless the property in question for which the relief has been sought for is identifiable, no decree can be granted in respect of the same"

FALSE FRIVOLOUS AND VEXATIOUS CLAIMS WHAT CAN BE DONE BY COURT

Vinod Seth vs. Devinder Bajaj and Ors.:

MANU/SC/0424/2010 - Every person has a right to approach a court of law if he has a grievance for which law provides a remedy. Certain safeguards are built into the Code to prevent and discourage frivolous, speculative and vexatious suits. Section 35 of the Code provides for levy of costs. Section 35A of the Code provides for levy of compensatory costs in respect of any false or vexatious claim. Order 7 Rule 11 of the Code provides for rejection of plaint, if the plaint does not disclose a cause of action or is barred by any law. Order 14 Rule 2 of the Code enables the court to dispose of a suit by hearing any issue of law relating to jurisdiction or bar created by any law, as a preliminary issue. Even if a case has to be decided on all issues, the court has the inherent power to expedite the trial/hearing in appropriate cases, if it is of the view that either party is abusing the process of court or that the suit is vexatious. The court can secure the evidence (examination-in-chief) of witnesses by way of affidavits and where necessary, appoint a commissioner for recording the cross examination so that it can dispose of the suit expeditiously. The court can punish an erring plaintiff adopting delaying tactics, by

levying costs under Section 35B or taking action under Order 17 Rules 2 and 3 of the Code. Apart from recourse to these provisions in the Code, an aggrieved defendant can also sue the plaintiff for damages, if the suit is found to be based on a forged or false document, or if the suit was vexatious or frivolous. But the Code, nowhere authorizes or empowers the court to issue a direction to a plaintiff to file an undertaking to pay damages to the defendant in the event of being unsuccessful in the suit. The Code also does not contain any provision to assess the damages payable by a plaintiff to defendant, when the plaintiff's suit is still pending, without any application by defendant, and without a finding of any breach or wrongful act and without an inquiry into the quantum of damages. There is also no contract between the parties which requires the appellant to furnish such undertaking. None of the provisions of either TP Act or Specific Relief Act or any other substantive law enables the court to issue such an interim direction to a plaintiff to furnish an undertaking to pay damages. In the absence of an enabling provision in the contract or in the Code or in any substantive laws a court trying a civil suit, has no power or jurisdiction to direct the plaintiff, to file an affidavit undertaking to pay any specified sum to the defendant, by way of damages, if the plaintiff does not succeed in the suit. In short, law does not contemplate a plaintiff indemnifying a defendant for all or any losses sustained by the defendant on account of the litigation, by giving an undertaking at the time of filing a suit or before trial, to pay damages to the defendants in the event of not succeeding in the case.

WHEN THE CONTRACT ITSELF ILLEGAL NO RELIEF CAN BE GIVEN ON CONTRACT VIOLATIONS

Maya and Ors. vs. Sreekumar and Ors.:

MANU/KE/0566/2018 - A contract to appoint a person to a public office or involving the sale of a public office is opposed to public policy and is consequently void. When the contract, which is the foundation of the suit, is based on an unlawful consideration, it is opposed to public policy and void. When the illegality of the contract has been made to appear, the law will not extend its aid to either of the parties, who will be left to suffer the consequences of their own acts. Where the contract is against public policy, an action cannot be maintained to enforce it directly or to recover the value of the services rendered or the money paid under it. In the instant case, if the Court is to assist the plaintiff to recover his money, it would have the effect of encouraging bribery and corruption. Every person in the position of the plaintiff would be tempted to offer bribe to get employment which he could do with impunity and without risk of loss if he secures the appointment and if he does not, he can sue to recover the money. A court of law shall not assist such a person. Where a contract, express or implied, is expressly or by implication forbidden by statute, no Court will lend its assistance to give it effect. A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. It is well established that a contract which involves in its fulfillment the

doing of an act prohibited by statute is void. What is done in contravention of the provisions of an Act of the Legislature cannot be made the subject of an action. Section 65 of the Act is inapplicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void ab initio and there would be no room for subsequent discovery of that fact. In the instant case, the plaintiff has no case that when he gave money to Madhu for securing a job for him, he had no knowledge of the illegality of the transaction. It is not a case where the agreement relating to the transaction was discovered to be void or it became void by subsequent happenings. The provision contained in Section 65 of the Act does not come to the rescue of the plaintiff to recover the illegal gratification paid by him for securing a job in an aided school.

Adv - Sridhara babu N

CHAPTER
SPECIFIC PERFORMANCE AND CONTRACT
WHEN THERE IS CLAIM OF DAMAGES AS ALTERNATIVE IN
SPECIFIC PERFORMANCE SUIT

Apex Court's judgment in the case of KANSHI RAM vs. OM PRAKASH JAWAL AND OTHERS, reported in

MANU/SC/2149/1996 : AIR 1996 SC 2150. Para 5 of the said decision read out by him is as follows:

"5. Having regards to the facts of this case and the arguments addressed by the learned counsel, the question that arises for consideration is: whether it would be just, fair and equitable to grant the decree for specific performance? It is true that the rise in prices of the property during the pendency of the suit may not be the sole consideration for refusing to decree the suit for specific performance. But it is equally settled law that granting decree for specific performance of a contract of immovable property is not automatic. It is one of discretion to be exercised on sound principles. When the Court gets into equity jurisdiction, it would be guided by justice, equity, good conscience and fairness to both the parties. Considered from this perspective, in view of the fact that the respondent himself had claimed alternative relief for damages, we think that the Courts would have been well justified in granting alternative decree for damages, instead of ordering specific performance which would be unrealistic and unfair. Under these circumstances, we hold that the decree for specific performance is inequitable and unjust to the appellant."

COURT SHOULD CONSIDER ALL FACTS BEFORE ORDERING SPECIFIC PERFORMANCE

Parakunnnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son and Ors. MANU/SC/0182/1987 : 1987CriLJ1877

, Court has observed that the court should meticulously consider all facts and circumstances before granting specific performance. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage.

TIME IS THE ESSENCE OF CONTRACT EXPRESSLY AGREED AND VIOLATED – NO SPECIFIC PERFORMANCE

M/s. P.R. Deb and Associates vs. Sunanada Roy (01.03.1996 - SC) : MANU/SC/0379/1996 -- 1996-I Kar.L.J. 726 (SC)

.....In the present case, the right of the appellant to purchase suitable residential accommodation is seriously affected by non-payment of Rs. 4 lakhs within a reasonable time. The respondent had failed to comply with the term of the agreement relating to payment of this amount. In these circumstances, in any case, a decree for specific performance cannot be granted as it would be unfair and unreasonable to do so.

Court in N. Srinivasa v. Kuttukaran Machine Tools Ltd. MANU/SC/0265/2009 : 2009 (5) SCC 182 that “27. In a contract for sale of immoveable property, normally it is presumed that time is not the essence of the contract. Even if there is an express stipulation to that effect, the said presumption can be rebutted. It is well settled that to find out whether time was the essence of the contract. It is better to refer to the terms and conditions of the contract itself.”

Constitution Bench of Court in Chand Rani v. Kamal Rani MANU/SC/0285/1993 : 1993 (1) SCC 519, wherein Court outlined the principle thus: It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.

Mrs. Saradamani Kandappan vs. Mrs. S. Rajalakshmi and Ors.: MANU/SC/0717/2011 – AIR 2011 SC 3234 The intention to make time stipulated for payment of balance consideration will be considered to be essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement. If for example, the vendor discloses in the agreement of sale, the reason for the sale and the reason for stipulating that time prescribed for payment to be the essence of the contract, that is, say, need to repay a particular loan before a particular date, or to meet an urgent time bound need (say medical or educational expenses of

a family member) time stipulated for payment will be considered to be the essence. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract.

MERE SHOWING OF READINESS AND WILLINGNESS WOULD NOT DISCHARGE THE OBLIGATION, UNLESS IT IS SHOWN TO BE REAL AND GENUINE

Apex Court's judgment in the case **NARINDER KUMAR MALIK v. SURINDER KUMAR MALIK** reported in MANU/SC/1484/2009 : (2009) 8 SCC 743 wherein it is held that mere showing of readiness and willingness would not discharge the obligation, unless it is shown to be real and genuine. Paras 21 to 24 of the said decision relied upon by him are as follows: "21. To ascertain if the time was of the essence of the contract, we have to go through Condition (iii) of the MoU which categorically mentions that the second party viz. the respondent herein shall make the payment of the balance amount of Rs. 3.25 crores within a maximum period of one hundred fifty days from the date of execution of the MoU i.e. up to or before 9-7-2005. However, this period of one hundred fifty days was extendable by another ten to twenty days, if need be with the consent of both the parties but not more.

22. The High Court certainly fell into error in construing the said provision in right perspective and erred in coming to the conclusion that since time was extendable, the time could not

have been made the essence of the contract. A bare perusal of the aforesaid provision makes it clear that ultimately the time was fixed only up to 9-7-2005. However, with an intention to give further leverage to the respondent herein, the time was made extendable by ten to twenty days and not more and that too only with the consent of the parties. Even if it is said that 9-7-2005 could not have been the last date, at least after twenty days the said last date expired.

23. Admittedly, the respondent has not honoured his commitment, within the extendable period given to him, even though he had no right to claim the benefit as of right for the extendable period.

24. The respondent sent the photocopies of three pay orders two of which were for a sum of Rs. 1 crore each and the third one for a sum of Rs. 1.25 crore. It was neither here nor there as the originals were never tendered to the appellant and only photocopies were sent to make a semblance that the respondent had been ready and willing to perform his part of the contract. When MoU had already been arrived at between the parties then mere show of readiness and willingness would not discharge the obligation resting on one of the parties unless it is shown to be real and genuine. From the conduct, behavior and attitude of the respondent it is clearly made out that he had not been ready and willing to perform his part of the contract as mentioned in the MoU."

Hon'ble Supreme Court's decision in the case of **PRAMOD BUILDINGS & DEVELOPERS (P) LTD. v. SHANTA CHOPRA**

reported in AIR 2011 SC 1424 wherein it is held that the plaintiff- vendee in a specific relief suit cannot succeed, unless he proves that he was ready and willing to perform the contract.

Apex Court's judgment in the case of **M.M.S.INVESTMENTS, MADURAI & Ors. v. V.VEERAPPAN & Ors. reported in (2007) SC 2663**, the learned counsel contends that the defendant Nos.2 and 3 have not discharged their burden of proving that they are the bona fide purchasers for value without notice. The readiness and willingness aspect will not give any relief to the appellants. He submits that as the defendant No.1 has abstained from witness box, the plaintiff's appearance in the witness box and deposing about his readiness and willingness cannot be disputed at all.

Court's decision in the case of **T.MOHAN v. P.VENKATARAMA REDDI reported in ILR 2003 KAR 3533**. Para 10 of the said decision read out by him is as follows: "10. Coming to the question of readiness and willingness of the plaintiff to perform her part of the contract, it was so averred in the plaint and reiterated in the notice dated 18/19.5.1981 and also in the evidence of the plaintiff. Further, the question of readiness and willingness to pay the balance consideration money is not of much importance in view of the admitted factual position that the vendor had parted with possession of the property in favour of the purchaser even before expiry of the period stipulated in the agreement. In that view of the matter, no exception can be taken to the finding of the High Court that the plaintiff duly satisfied

the requirement of law of readiness and willingness to perform her part of the contract."

CONSIDERATION OF HARDSHIP IN SPECIFIC PERFORMANCE SUIT

SMT. RANGANAYAKAMMA vs. N. GOVINDA NARAYAN reported in **MANU/KA/0099/1982 : AIR 1982 KAR 264**, if the enforcement of the contract is resulting in hardship to the defendant and its non-enforcement is not causing hardship to the plaintiff, the relief of specific performance has to be refused.

Apex Court's decision in the case of A.C. ARULAPPAN vs. SMT. AHALYA NAIK reported in **MANU/SC/0438/2001 : AIR 2001 SC 2783** wherein it is held that the plaintiff is not entitled to the decree of specific performance of contract, if under the terms of the contract the plaintiff gets an unfair advantage over the defendant. So also the specific relief may not be granted, if the defendant is going to be put to undue hardship, which he did not foresee at the time of the agreement. If it is inequitable to grant the relief of specific performance of contract, then also the Court would desist from granting a decree to the plaintiff.

MERE MOU'S ARE NOT AGREEMENT FOR SALE – NO ENCUMBRANCE ON PROPERTY

Mrs. Saradamani Kandappan vs. Mrs. S. Rajalakshmi and Ors.: MANU/SC/0717/2011 – AIR 2011 SC 3234

An 'encumbrance' is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. [See National Textile Corporation v. State of Maharashtra MANU/SC/0279/1977 : AIR 1977 SC 1566 and State of H.P. v. Tarsem Singh MANU/SC/0529/2001 : 2001 (8) SCC 104]. Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance. The MO Us said to have been executed by Respondents 1 to 3 provide that agreements of sale with mutually agreed terms and conditions will be entered between the parties after clearance of all pending or future litigations. Therefore the MO Us are not even agreements of sale.

RIGHT TO PROPERTY IS A HUMAN RIGHT

Apex Court in the case of TUKARAM KANA JOSHI & OTHERS VS. M.I.D.C. & OTHERS - MANU/SC/0933/2012 : (2013) 1 SCC 353, The observations made in paragraphs 8, 9 & 10 are usefully extracted as under:

"8. The appellants were deprived of their immovable property in 1964, when Article 31 of the Constitution was still intact and the right to property was a part of fundamental rights under Article 19 of the Constitution. It is pertinent to note that even after the right to property ceased to be a fundamental right, taking possession of or acquiring the property of a citizen most certainly tantamounts to deprivation and such deprivation can take place only in accordance with the "law", as the said word has specifically been used in Article 300-A of the Constitution. Such deprivation can be only by resorting to a procedure prescribed by a statute. The same cannot be done by way of executive fiat or order or administration caprice. In *Jilubhai Nanbhai Khachar v. State of Gujarat* - MANU/SC/0033/1995 : AIR 1995 SC 142, it has been held as follows: "48. In other words, Article 300-A only limits the powers of the State that no person shall be deprived of his property save by authority of law. There [is] no deprivation without [due] sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation."

9. The right to property is now considered to be not only a constitutional or a statutory right but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter and employment, etc. Now however, human rights are gaining an even greater multifaceted dimension. The right to property is considered very much to be a

part of such new dimension. (Vide Lachhman Dass v. Jagat Ram - MANU/SC/7133/2007 : (2007) 10 SCC 448, Amarjit Singh v. State of Punjab - MANU/SC/0780/2010 : (2010) 10 SCC 43, State of M.P. v. Narmada Bachao Andolan - MANU/SC/0599/2011 : (2011) 7 SCC 639, State of Haryana v. Mukesh Kumar and Delhi Airtech Services (P) Ltd. v. State of U.P. - MANU/SC/0956/2011 : (2011) 9 SCC 354)

10. In the case at hand, there has been no acquisition. The question that emerges for consideration is whether, in a democratic body polity, which is supposedly governed by the rule of law, the State should be allowed to deprive a citizen of his property, without adhering to the law. The matter would have been different had the State pleaded that it has right, title and interest over the said land. It however, concedes to the right, title and interest of the appellants over such land and pleads the doctrine of delay and laches as grounds for the dismissal of the petition/appeal."

In paragraph 17, the Apex Court observes that depriving the appellants therein of the immovable properties was a clear violation of Article 21 of the Constitution and in a welfare State, statutory authorities were bound not only to pay adequate compensation, but also to rehabilitate such persons and hence, it was not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights under the garb of development. The Apex Court proceeds to further observe in paragraph 19 that the appellants before it had been seriously discriminated against qua other persons, whose lands were also acquired and some of them had been given

benefits of acquisition in the year 1966 itself. Such kind of discrimination would not only breed corruption, but also disrespect for governance because of frustration that it left behind. The contention urged by the respondent-statutory body setting up delay and laches as a defence has been turned down because the action complained remained a slur on the system of governance and justice as well which was anathema to the doctrine of equality, which is the soul of the constitution.

It is useful to extract certain observations found in the latter part of paragraph 19 and in paragraph 29, which reads as under: "19.Even under valid acquisition proceedings, there is a legal obligation on the part of the authorities to complete such acquisition proceedings at the earliest, and to make payment of requisite compensation. 20. While dealing with the similar issue, this Court in *K. Krishna Reddy v. Collector (LA)* - MANU/SC/0217/1988 : AIR 1988 SC 2123, held as under: "12. ...After all money is what money buys. What the claimants could have bought with the compensation in 1977 cannot do in 1988. Perhaps, not even one-half of it. It is a common experience that the purchasing power of rupee is dwindling. With rising inflation, the delayed payment may lose all charms and utility of the compensation. In some cases, the delay may be detrimental to the interests of claimants. The Indian agriculturists generally have no avocation. They totally depend upon land. If uprooted, they will find themselves nowhere. They are left high and dry. They have no savings to draw. They have nothing to fall back upon. They know no other work. They may even face starvation unless rehabilitated. In all such cases, it is of utmost importance

that the award should be made without delay. The enhanced compensation must be determined without loss of time."

In paragraph 22, the Apex Court has concluded as under: "22. Be that as it may, ultimately, good sense prevailed, and the learned Senior Counsel appearing for the State came forward with a welcome suggestion stating that in order to redress the grievances of the appellants, the respondent authorities would notify the land in dispute under Section 4 of the Act within a period of 4 weeks from today. Section 6 declaration will be issued within a period of one week thereafter. As the appellants have full notice and information with respect to the proceedings, publication in the newspapers either of the notification or of the declaration under the Act are dispensed with. Notice under Section 9 of the Act will be served within a period of 4 weeks after the publication of Section 6 declaration and award will be made within a period of three months thereafter. The deemed acquisition proceedings would thus be concluded most expeditiously. Needless to say, the market value of the land in dispute will be assessed as it prevails on the date on which the Section 4 notification is published in the Official Gazette. Payment of compensation/award amount will be made to the claimants/persons interested immediately thereafter, along with all statutory benefits. The appellants shall be entitled to pursue the statutory remedies available to them for further enhancement of compensation, if so desired."

IF THE CONTRACT IS REGISTERED AND THERE IS SUBSEQUENT ATTACHMENT, ANY SALE DEED EXECUTED AFTER ATTACHMENT WILL BE VALID

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The concept of registration has been introduced in Section 64(2) of the Code to prevent false and frivolous cases of contracts being set up with a view to defeating the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid. If it is unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected. There is no ambiguity in Section 64(2).

AGREEMENT AGAINST LAW - NO QUESTION OF ILLEGALITY CAN ARISE UNLESS THE PERFORMANCE OF THE UNLAWFUL ACT WAS NECESSARILY THE EFFECT OF AN AGREEMENT

In *Shri Lachoo Mal vs. Shri Radhey Shyam* [(1971) 1 SCC 619] Court while deciding whether an agreement was void and not enforceable under Section 23 of the Indian Contract Act held: "What makes an agreement, which is otherwise legal, void is that its performance is impossible except by disobedience of law. Clearly no question of illegality can arise unless the performance of the unlawful act was necessarily the effect of an agreement."

WHERE A CONTRACT IS VOID AB INITIO - ARBITRATION CLAUSE ALSO CANNOT OPERATE

National Insurance Company Limited v. Boghara Polyfab Private Limited [(2009) 1 SCC 267] in which Court has held that where a contract is void ab initio and has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void.

ONEROUS CONTRACTS

In M/s Alopi Parshad and Sons. Ltd. Vs. Union of India - (1960) 2 SCR 793, Court clarified that the courts have no power to absolve a party from liability to perform a contract merely because the performance becomes onerous; the expressed covenants in a contract cannot be ignored only on account of unexpected and un contemplated turn of events after the contract. However, a consideration of the terms of the contract in the light of circumstances, when it was made, shows that the parties never agreed to be bound in a fundamentally different situation which unexpectedly emerges, the contract ceases to bind at that point, not because the Court in its discretion considers it just and reasonable to qualify the terms of the contract but because on its true construction it does not apply in that situation. Here again, it has to be noted that the doctrine of frustration can only apply to executory contracts and not the transactions which have created a demise in praesenti (See, H.V. Rajan Vs. C.N. Gopal and Ors. - AIR 1975 SC 261, 265).

In Raja Dhruv Dev Chand Vs. Harmohinder Singh & Anr., (1968) 3 SCR 339, their Lordships held - "There is a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract do not invalidate a concluded transfer".

VOID AND VOIDABLE CONTRACTS

The transaction may be void if not enforceable at law as being destitute to legal effect. It has no legal existence and, thus, ceases to be enforceable by law, as defined under Section 2(g) of the Indian Contract Act, 1872 and such, transactions are dealt with under the provisions of Sections 20, 23, 26, 27, 28 and 29 of the Contract Act. A transaction or document may be voidable but it remains enforceable at law at the option of one or more party thereto, but not at the option of any other stranger. It may include where an agreement is arrived at by coercion, undue influence, by playing fraud or misrepresentation and in such a case it is for the party seeking to avoid it to set up the defence and if it is not done, the agreement would be a binding contract, A document may be unenforceable for procedural reasons, i.e., for deficiency of stamps, for want of registration or not being executed within the limitation; but in all such cases it does not become void, it may be merely voidable. Where an agreement in substance owing to flaws in the contract or incapacity of the parties or want of free consented., such agreements are valid unless they are impeached by the said party. (Vide : Shibha Prasad Singh v. Srish Chandra, AIR 1949 PC 297; Kalyanpur

Lime Works Ltd. v. State of Bihar, AIR 1954 SC 165; and Dhanyalakshmi Rice Mills v. Commissioner of Civil Supplies, AIR 1976 SC 2243).

In Immani Appa Rao v. G. Ramahngamurthi, AIR 1962 SC 370, the Hon'ble Supreme Court has observed that while considering a case where a plea of fraud has been raised, the Court must be conditioned solely by consideration of public policy.

In Ammathyee alias Perumalakkal v. Kumaresan. AIR 1967 SC 569, the Hon'ble Supreme Court has held that the power of gift is much more circumscribed in case of ancestral property. A Hindu father or any other Managing Member has power to make a gift of ancestral immovable property within reasonable limits for pious purposes. In such a case where the gift is challenged on the ground of capacity to alienate by gift, it was found that it was beyond the capacity of the father-in-law to make a gift of such a share of immovable property in favour of the daughter-in-law specially when the father-in-law himself could not make such a gift and, therefore, the transaction was found to be invalid.

Any agreement which is opposed to Personal Law of the parties or opposed to public policy, is void (Vide: C.N. Arunachala Mudaliyar v. C.A. Muruganatha Mudaliar, AIR 1953 SC 495 and S.R. Nayak v. Union of India, AIR 1991 SC 1420).

In Yamuna Bai Anantrao Adhav v. Anantaro Shivram Adhav, (1988) 1 SCC 530 : (AIR 1988 SC 644), the term "void" was explained by the Hon'ble Supreme Court in reference to the Hindu Marriage Act, 1956 and it was held that a marriage, which is void under Section 11, can be held to be so without a formal declaration by a Court in a proceeding for the reason that the marriage can be treated as null and void from its very inception. In that case, the marriage was nullity as it was found to be in contravention of the provisions and conditions, specified in Clause (1)(iv) and (v) of Section 5 of the Hindu Marriage Act, 1955.

Any agreement providing for wagering is void as it is hit by public policy and would be hit by the provisions of Section 23 of the Contract Act. In **Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons, AIR 1975 SC 1223**, the Supreme Court has held as under :-- "If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of other agreement, which, though void, is not in itself prohibited within the meaning of Section 23 of the Contract Act, it may be enforced as a collateral agreement. If, on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, the Courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by Section 23 of the Contract Act. It is well established that the object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a

"void contract." A void agreement, when coupled with other facts, may become part of a transaction which creates legal rights, but this is not so if the object is prohibited or "mala in se."

In Raghubachamani Prasad Naraih Singh v. Ambica Prasad Singh, AIR 1971 SC 776, the Hon'ble Supreme Court held that in any event a alienation by the Manager of the Joint Hindu Family even without legal necessity, is voidable and not void.

In Nawab Khan Abbas Khan v. State of Gujarat, AIR 1974 SC 1471, the Hon'ble Supreme Court has referred to and relied upon the judgment of the House of Lords in Ridge v. Baldwin (1963) 2 All ER 66, wherein it has been observed as under (para 10 of AIR):-- "Voidable acts are those which can be invalidated in certain proceedings; these proceedings are specially formulated for the purpose of directly challenging such act..... On the other hand, when an act is not merely voidable but void, it is a nullity and can be discarded and impeached in any proceeding, before any Court or Tribunal and whenever it is relied upon. In other words, it is subject to collateral attack..... When Court holds an act a nullity, is that it is not a declaration of nullity; it is a true annulment, an annulment with retroactive force."

G. Annamalai Pillai v. District Revenue Officer (1993) 2 SCC 402 : (1993 AIR SCW 2618), wherein the Hon'ble Supreme Court placed reliance upon a catena of judgments and held that a void agreement must fail to receive legal recognition or sanction for the reason that the agreement was wholly destitute of legal

efficacy. A voidable agreement stands on a different footing as it is not a nullity but its operation is conditional and not absolute.

Apex Court in State of Kerala v. ML K. Kunhikannan, (1996) 1 SCC 435 : (AIR 1996 SC 906), wherein the Supreme Court has held that there are no degrees in nullity.

The issue of applicability of this Rule 7, Order 11, C.P.C. was considered by the Hon'ble Supreme Court in **T. Arivandandam v. T.V. Satyapal, AIR 1977 SC 2421**, and it was observed that the Court must give a meaningful reading to the plaint and if it is manifestly vexatious or merit less and in the sense of not disclosing a clear right to sue, the Court may exercise its power under Order 7, Rule 11, C.P.C. However, the Court has to take care that the grounds mentioned therein must be fulfilled and while doing so, the Court does not have to decide the legal issues. However, in a case where the validity of a particular document itself is under challenge, the same cannot be considered and decided. The application under Order 7, Rule 11, C.P.C. cannot be allowed.

AGREEMENT CAN BE SPELT OUT FROM MUTUAL CORRESPONDENCE OF PARTIES

AIR 1999 SC 504 [M/s.Rickmers Verwaltung Gimb H v. Indian Oil Corporation Ltd.]; An agreement, even if not signed by the parties, can be spelt out from correspondence exchanged

between the parties: "... it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence".

SPECIFIC PERFORMANCE OF CONTRACT AFTER OBTAINING REQUISITE PERMISSION AND LIMITATION

Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai (dead) by L.Rs and Anr., AIR 1986 SC 1912 : (1986)3 SCC 300. Under an agreement of sale there was a precondition to obtain the permission of the authorities to use the subject property as a

village site, for the execution of a sale deed. The Court held that such a contract was not a contingent contract and that a suit for specific performance filed within 3 years after obtaining permission was not barred by limitation.

‘AGREEMENT TO LEASE’ AND ‘AGREEMENT OF LEASE’

State of Maharashtra and Ors. v. Atur India Private Limited, 1994 SCC (2) 497, JT 1994 (1) 640 . While considering the distinction between an agreement to lease and an agreement of lease has held as follows.-- "We will now turn to Indian law. Mulla in the Transfer of Property Act (7th Edition), at page 647 dealing with agreement to lease states as under "An agreement to lease may effect an actual demise in which case it is a lease. On the other hand, the agreement to lease may be a merely executory instrument binding the parties, the one, to grant, and the other, to accept a lease in the future. As to such an executory agreement the law in England differs from that in India. An agreement to lease not creating a present demise is not a lease and requires neither writing nor registration. As to an executory agreement to lease, it was at one time supposed that an intending lessee, who had taken possession under an agreement to lease capable of specific performance, was in the same position as if the lease had been executed and registered. These cases have, however, been rendered obsolete by the decisions of the Privy Council that the equity in Walsh v. Lonsdale does not apply in India".

SALE AGREEMENT IS NOT AN ENCUMBRANCE ON PROPERTY 2011 JULY SC

JUSTICE R.V. Raveendran, & JUSTICE K.S. Panicker Radhakrishnan in *Saradamani Kandappan vs S. Rajalakshmi & Ors* 2011 JULY SC An 'encumbrance' is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. [See *National Textile Corporation vs. State of Maharashtra* - AIR 1977 SC 1566 and *State of H.P. vs. Tarsem Singh* - 2001 (8) SCC 104]. Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance.

INGREDIENTS NECESSARY TO MAKE AN AGREEMENT TO SELL

In Aggarwal Hotels (P) Ltd. vs. Focus Properties (P) Ltd., 63(1996) Delhi Law Times 52, Court, inter alia, observed as under:

"The four ingredients necessary to make an agreement to sell are: (i) particulars of consideration; (ii) certainty as to party i.e. the vendor and the vendee; (iii) certainty as to the property to be sold; and (iv) certainty as to other terms relating to probable cost of conveyance to be borne by the parties, time, etc. If these ingredients are lacking in the agreement, the obligations

contemplated under Section 16 for specific performance for Immovable property would not arise. It is in this background that the receipt dated June 17, 1995 has to be examined."

The Apex Court in the case of **K.S. Vidyanadam and Others Vs Vairavan reported in MANU/SC /0404/1997 : AIR 1997 SC 1751** has held as under:-

- (i) "Courts, while exercising discretion in suits for specific, performance, should bear in mind that when the parties prescribe a time /period, for taking certain steps or for completion of the transaction, that must have some significance and, therefore, time/period, prescribed cannot be ignored.
- (ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was ready and willing' to perform his part of the contract.
- (iii) Every suit for specific performance need not be decreed merely because it is filed, within the period of limitation by ignoring the time-limits stipulated in the agreement Courts will also frown upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended, to assist purchasers in special cases, as for example, where the major part, of the consideration has been paid to the vendor and possession has been delivered, in part, performance, where equity shifts in favour of the purchaser.

Mrs. Saradamani Kandappan Vs Mrs. S. Rajalakshmi & Ors. reported in MANU/SC/ 0717/2011 : AIR 2011 SC 3234 has held as under:- The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed, to be not material, or at all events considered as merely indicating the reasonable period, within which contract should be performed. The assumption was that grant, of specific, performance would not prejudice the vendor-defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration, to say that properties in cities, worth a lakh or so in or about 1975 to 1980. may cost a crore or more now.

Aloka Bose v. Parmatma Devi, MANU/SC/8475/2008 : AIR 2009 SC 1527; The following discussion in the said judgment is reproduced for ready reference: "5) The defendant submitted that a contract for sale, like any other contract, is bilateral in nature under which both vendor and the purchaser have rights and obligations. It is submitted that an agreement for sale being a contract for sale, creating a right in the purchaser to obtain a deed of conveyance in terms of the agreement under which, the vendor agrees to convey to the purchaser, and the purchaser agrees to purchase, the subject-matter of the agreement for an agreed consideration, subject to the terms and conditions stipulated in the said agreement, it is bilateral. It is therefore contended that an agreement of sale is neither complete nor enforceable unless it is signed by both parties.

6) Certain amount of confusion is created on account of two divergent views expressed by two High Courts. In *S.M. Gopal Chetty v. Raman* [AIR 1998 Madras 169], a learned Single Judge held that where the agreement of sale was not signed by the purchaser, but only by the vendor, it cannot be said that there was a contract between the vendor and the purchaser; and as there was no contract, the question of specific performance of an agreement signed only by the vendor did not arise. On the other hand, in *Md Mohar Ali v. Md. Mamud Ali* [AIR 1998 Gauhati 92], a learned Single Judge held that an agreement of sale was an

unilateral contract (under which the vendor agreed to sell the immovable property to the purchaser in accordance with the terms contained in the said agreement), that such an agreement for sale did not require the signatures of both parties, and that therefore an agreement for sale signed only by the vendor was enforceable by the purchaser.

7) We find that neither of the two decisions have addressed the real issue and cannot be said to be laying down the correct law. The observation in Md. Mohar Ali (supra) stating that an agreement of sale is an unilateral contract is not correct. An unilateral contract refers to a gratuitous promise where only party makes a promise without a return promise. Unilateral contract is explained thus by John D. Calamari & Joseph M. Perillo in The Law of Contracts (4th Edition Para 2-10(a) at pages 64-65): "If A says to B, 'If you walk across the Brooklyn Bridge I will pay you \$ 100,' A has made a promise but has not asked B for a return promise. A has asked B to perform, not a commitment to perform. A has thus made an offer looking to a unilateral contract. B cannot accept this offer by promising to walk the bridge. B must accept, if at all, by performing the act. Because no return promise is requested, at no point is B bound to perform. If B does perform, a contract involving two parties is created, but the contract is classified as unilateral because only one party is ever under an obligation."

All agreements of sale are bilateral contracts as promises are made by both - the vendor agreeing to sell and the purchaser agreeing to purchase. On the other hand, the observation in S.M. Gopal Chetty (supra) that unless agreement is signed both by the

vendor and purchaser, it is not a valid contract is also not sound. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing, one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and the vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it. Section 10 of the Act provides all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The proviso to section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-

offers by letters or other modes of recognized communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale."

PLEADINGS AND PROOF IN SPECIFIC PERFORMANCE

In OUSEPH VARGHESE vs. JOSEPH ALEY & Others reported in 1969(2) SCC page 539, the Hon'ble Supreme Court has held that the burden of proving the agreement is on the plaintiff. The plaintiff must plead and prove his readiness and willingness. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st schedule in the CPC.

In GURUPADAYYA vs. SHIVAPPA reported in 1978(1) Kar.LJ page 425, Court has held, the pleadings and proof in specific performance suit should be in conformity with section 16(c) and Form No.47 and 48 of the 1st schedule to CPC.

PLEADINGS AND EVIDENCE OF SURROUNDING CIRCUMSTANCES RELEVANT IN SPECIFIC PERFORMANCE SUITS

In RAJESHWARI vs. PURAM INDORIA reported in (2005) 7 SCC page 60, the Hon'ble Supreme Court has held, in a suit for

specific performance whether the plaintiff was ready and willing in terms of section 16 of Specific Relief Act, whether it is a case for exercise of discretion in terms of section 20 of Specific Relief Act, whether there was latches on the part of plaintiff in approaching Court are normally the questions which fall for consideration. In some cases question of limitation may also arise. The finding on primary aspects would depend upon pleadings and evidence in the light of surrounding circumstances.

SPECIFIC PERFORMANCE SUIT WITHOUT NOTICE

In BADDAM PRATAPA REDDY vs. CHENNADI JALAPATHI REDDY & Another reported in AIR 2008 (NOC) 2644 (AP), it has been held, if a suit is filed for specific performance without making prior demand by way of notice the suit is not in compliance with form Nos.47 and 48.

In P.SARAVANAM & Others vs. V.L.TYAGARAJ reported in AIR 1980 NOC 40 (KANT), Court has held, no notice demanding conveyance was sent, but only protest lodged with the vendors, the conduct of the plaintiff does not constitute any expression of readiness and willingness, the suit for specific performance is liable to be dismissed.

PRICE ESCALATION AND SPECIFIC PERFORMANCE

In NIRMALA ANAND vs. ADVENT CORPORATION (P) Ltd., and Others reported in (2002) 8 SCC page 146, the Hon'ble Supreme Court has held that price escalation during the pendency of the litigation cannot be a reason to deny the relief of specific performance. The Court can impose reasonable condition including payment of additional amount by the purchaser and it should not be onerous.

"The Apex Court : in the case of P.S. Ranakrishna Reddy Vs M. K. Bhaggalakshmi and Another reported in **2007 AIR SCW 1383** held that rise in the price of an immovable property by itself is not a ground for refusal to enforce a lawful agreement of sale.

UNLESS THE TRANSFEREE ESTABLISHES THAT HE HAD TAKEN REASONABLE CARE TO ASCERTAIN THE RIGHT OR TITLE OF THE TRANSFEROR AND THE TRANSFEREE HAD ACTED IN GOOD FAITH, THOUGH THE SALE DEEDS ARE FOR VALID CONSIDERATION IS ITSELF HELD TO BE NOT SUFFICIENT TO VALIDATE SUCH TRANSACTION

ILR 2003 Kar. 1774 [Mallappa Adivappa Hadapad Vs. Smt. Rudrawwa and Others]; wherein the revenue records stood in the name of the transferor at the time when the transferee purchased the property and Court held that unless the transferee establishes that he had taken reasonable care to ascertain the right or title of the transferor and the transferee

had acted in good faith, though the Sale Deeds are for valid consideration is itself held to be not sufficient to validate such transaction under Section 41 of the Act. Mere varadi to change revenue entries does not confer valid title. It need not be said that a party cannot make out a new case during trial or at any stage subsequent thereto if he/she has not pleaded about it in her/his pleadings. It is not that the protection being claimed by the 1st defendant under Section 41 of T.P. Act is purely a question of law, not based on facts. In fact, a decision on the plea of protection under Section 41 of T.P. Act depends on several questions of fact, each requiring careful examination and as such, it cannot be said that unless such a plea was taken in the pleading and put in issue between the parties, a party to the proceedings can raise the plea covered by Section 41 of T.P. Act, for the first time in appeal. the 1st defendant not specifically pleaded that defendants No. 2 to 4 were the ostensible owners of the suit lands, though pleaded that he is a bonafide purchaser for value without notice of plaintiff's right, if any. It is not that Section 41 of the said Act comes to the aid of a party without there being any pleading or a case set up by party that the purchase was through an ostensible owner. If the sale is not by an ostensible owner, the said provision of law does not come into picture..... It need not be said that transfer of an immoveable property can be by way of registered document when the value of such property is more than Rs. 100/-. It is not the case or evidence of 1st defendant that when plaintiff gave "Varadi", as contended by him, the suit lands were worth less than Rs. 100/- and as such, on account of such consent

"Varadi", they derived any title, much less, a valid title to the suit lands.

Ashok vs. Annapurna and Ors. : MANU/KA /1885/2017 - ILR 2017 KAR 5012 - Analysis of Section 43 of the T.P. Act gives a picture that when the transfer of immovable property takes place, the transferor should not have transferable interest. Yet he transfers the property fraudulently or erroneously making a representation that he has a transferable interest, and, if any time in future, the transferor acquires interest in the property, the transferor is estopped from taking a contrary stand against the interest of transferee who acted on that misrepresentation. In other words, Section 43 protects the interest of transferee if he has been misled by the transferor in the guise of having a transferable interest. The only condition for seeking protection under Section 43 of the T.P. Act is contract between transferor and transferee must be in subsistence during the time when the former acquires the interest. But transferee cannot take protection Under Section 43 of the T.P. Act if he enters into transaction knowing fully well that the transferor had no right or any kind of interest. The transferee knows that the transferor did not possess the title at the time of transfer, the transferee cannot be said to have acted on it while taking a transfer. Section 43 of the T.P. Act will have no application and the transfer has to fail.

Jumma Masjid Mercaraa v. Kodimaniandra Deviah (MANU/SC/0397/1962 : AIR 1962 SC 847) - "This reasoning is

open to the criticism that it ignores the principle underlying s. 43. That section embodies, as already stated, a rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. It is to be noted that when the decision under consideration was given, the relevant words of s. 43 were, "where a person erroneously represents", and now, as amended by Act 20 of 1929, they are "where a person fraudulently or erroneously represents", and that emphasises that for the purpose of the section it matters not whether the transferor acts fraudulently or innocently in making the representation, and that what is material is that he did make representation and the transferee has acted on it. Where the transferee knew as a fact that the transferor did not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application, and the transfer will fail under s. 6(a). But where the transferee does act on the representation, there is no reason why he should not have the benefit of the equitable doctrine embodied in s. 43, however fraudulent the act of the transferor might have been."

Hon'ble Supreme Court in the case of **Jharu Rama Roy v. Kamajit Roy and others** [MANU/SC/0092 /2009 : 2009 SAR (Civil) 313] in support of her arguments that the appellant cannot take shelter under Section 43 of the T.P. Act. The facts of

this case disclose that at the time of execution of the sale deed, vendor's father was alive. Even though the purchaser was very much aware of this, in the sale deed it was mentioned that the father had expired. The parties were governed by Dayabhaga School of Hindu Law. The vendor entered into transaction when his father was alive and therefore, he did not have any right to execute the sale deed and consequently, the purchaser who knew that the father was very much alive at the time of execution of the sale deed could not claim protection under Section 43 of the T.P. Act. This ruling makes it very clear that if the transferee is aware of the fact that the transferor had no transferable interest on the date of transfer, he cannot put forward Section 43 of the T.P. Act for protecting his interest.

Ram Pyare v. Rama Narain and others (MANU/SC/0293/1985 : AIR 1985 SC 694). In this judgment, the Hon'ble Supreme Court has clearly observed in para No. 4 as follows:- "It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. It is to be noted that when the decision under consideration was given, the relevant words of s. 43 were, "where a person erroneously represents" and now, as amended by Act 20 of 1929, they are "where a person fraudulently or erroneously represents", and that emphasises that for the purpose of the section it matters not whether the transferor acted fraudulently or innocently in making the representation, and that what is material is that he did make a representation and the transferee has acted on it.

Where the transferee knew as a fact that the transferor did not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. S. 43 would then have no application and the transfer will fail under s. 6(a). But where the transferee does act on the representation, there is no reason why he should not have the benefit of the equitable doctrine embodied in S. 43, however, fraudulent the act of the transferor might have been."

AGREEMENT OF SALE DOES NOT CONFER ANY TITLE

Sunil Kumar Jain v. Kishan 1995 AIR 1891, 1995 SCC (4) 147 wherein in a case which was disposed of in connection with the Land Acquisition Act it is held thus : "It is settled law that the agreement of sale does not confer title and, therefore, the agreement holder, even assuming that the agreement is valid, does not acquire any title to the property."

NO PRESUMPTION AS TO TIME BEING OF THE ESSENCE OF THE CONTRACT

A Constitution Bench in Chand Rani v. Kamal Rani (1993) 1 SCC 519 held that in case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of

granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case.

In K. S. Vidyanadam v. Vairavan (1997) 3 SCC 1 this Court held : (SCC p. 11, para 14) "Even where time is not of the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property."

Constitution Bench in Chand Rani v. Kamal Rani [1993 (1) SCC 519], wherein this court outlined the principle thus: "It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

Govind Prasad Chaturvedi v. Hari Dutt Shastri [1977 (2) SCC 539], Court held that fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. Where the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract. Thereafter this court held that even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time : (i) from the express terms of the contract; (ii) from the nature of the property and (iii) from the surrounding circumstances as for example, the object of making the contract. "... It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. [Vide Gomathinayagam Pillai v. Pallaniswami Nadar [(1967) 1 SCR 227: AIR 1967 SC 868] (at p. 233).] It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract."

2004 (8) SCC 689 Swarnam Ramachandran (Smt.) & Anr. vs. Aravacode Chakungal Jayapalan laid down the principle that in a contract of immovable property whether the real intention of

the party stating that time is the essence has to be seen by looking into all the facts and circumstances of the case. It was held that a vendor has no right to make time the essence of the contract, unless he is ready and willing to complete the process and secondly, when the vendor purports to make the time, essence of the contract, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract. It was held: "11. According to Pollock & Mulla: Indian Contract & Specific Relief Acts [(2001), 12th Edn., p. 1086], the intention can be ascertained from:

- "(i) the express words used in the contract;
- (ii) the nature of the property which forms the subject- matter of the contract;
- (iii) the nature of the contract itself; and
- (iv) the surrounding circumstances."

12. That time is presumed not to be of the essence of the contract relating to immovable property, but it is of the essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to

proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract."

In Citadel Fine Pharmaceuticals vs. Ramaniyam Real Estates Private Limited and others, (2011) 9 SCC 147, the Hon'ble Apex Court held that time to be an essence of contract can be inferred from nature of properties and terms of agreement. The parties by their conduct or otherwise may also extend the time for performance of contract from time to time.

DEVENDRA BASAPPA DODDANNAVAR v. SMT.PONUBAI & OTHERS reported in 1971(1) Mys.L.J. 245 the intention to make time as the essence of the contract is to be inferred from what transpired between the parties before and after the signing of the agreement. The circumstances that the value of property has increased cannot be a ground to deny the relief of specific performance.

Madras High Court in the case of **VAIRAVAN v. K.S.VIDYANANDAM AND OTHERS reported in AIR 1996 MADRAS 353** wherein it is held that where there was no express stipulation in the sale agreement saying that time was the essence of the contract, though it mentioned that within six months from the date of the contract the performance must be completed by executing and registering the sale deed by paying the balance price and that if within the said six months' period, the purchaser fails to carry out his part of the contract.

DISCRETION OF THE COURT

Nirmala Anand vs. Advent Corporation (P) Ltd. and Ors. reported in (2002) 8 SCC 146 Court observed: "6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance."

In Uttar Pradesh Co-operative Federation Ltd. vs. Sunder Bros. reported in AIR 1967 SC 249 the law is stated in the following terms: "8. It is well-established that where the discretion vested in the Court under s. 34 of the Indian Arbitration Act has been exercised by the lower court the appellate court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If

the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion.

In the decision reported as **(2010) 10 SCC 51 Man Kaur Vs. Hartar Singh Sangha** Supreme Court succinctly laying the criteria of grant of specific performance of the contract held: "29. We may attempt to clarify the position by the following illustrations (not exhaustive):

(A) The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance. In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

(B) The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages. As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.

(C) The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance."

Supreme Court in **Saradamani Kandappan v. S.Rajalakshmi (AIR 2011 SC 3234)**, relying on K.S.Vidyanadam's case held thus:

"(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and, therefore, time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."

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CHAPTER DECLARATION

DECLARATION IN A PARTITION SUIT IS NOT NECESSARY

Declaration in a partition suit is not necessary in view of the dictum of the Division Bench of this Court reported in the case of S. LOKANATHA vs. SMT. S. VARALAKSHMI AND OTHERS reported in ILR 2013 Kar 5063.

TITLE NOT PROVED TO DECLARE TITLE ONLY LEASE PROVED ORDERED NO EVICTION WITHOUT FOLLOWING DUE PROCESS OF LAW

Sureshchand and Ors. vs. The City Municipal Council, Sindhanur: MANU/KA/2206/2017 - Of course it is the contention of the plaintiffs that, in the open space they have put up construction of shops. But that itself will not create any right and title over the property in any manner, unless the property is transferred in favour of the plaintiffs or in the name of their father in accordance with the Transfer of Property Act or under any other law of Rules recognized. It is not the case of the plaintiffs that, their father or plaintiffs have acquired the title by means grant by the Municipality nor they have entered into sale transaction with defendant or Government. Therefore, the trial Court and First Appellate Court on appreciation of the such facts have come to a correct conclusion that the plaintiffs have not got title over the property and thereby denied granting such relief.

So far as long possession over the property whether on the lessee confer any title. That question does not arise in my opinion because of the reason that, once a person entered into a lease transaction with a person who has no right, title or interest over the property, and even assuming that by misrepresentation the defendant has allowed the plaintiffs to enter in the open space on lease, for all practical purposes the same relationship exists as between the lessor and a lessee. The lessor by virtue of transaction got every right to evict over the lease. The contract between the plaintiffs and defendant binds them irrespective of the ownership vests with the Government. Plaintiffs who are the lessees cannot deny the rights of the lessor and claim ownership over the property. It is well recognized principles of law that as long as the lessor and lessee relationship continued, the lessor would always got rights to evict the lessee from the premises in accordance with law. In this case though it is observed by both the courts that Government is the owner as it is shown that, the suit properties are in Sy. No. 768/1, nevertheless the relationship between the defendant and plaintiffs is not dissolved. At no point of time the plaintiffs have issued any notice to the defendant stating that they have acquired right, title and interest over the said property. Looking to the above facts and circumstances of the cases, the trial Court and First Appellate Court on the basis of the factual aspects with regard to the pleadings of the plaintiffs and findings given in the earlier suits and admission made by plaintiffs, considering all the facts, came to the conclusion that, the relationship between the plaintiffs and defendant is that of lessor and a lessee. In view of the

relationship, the plaintiffs cannot claim any ownership over the property. Of course the right to continue in the possession of the property is protected by both the courts by directing the defendant not to evict the plaintiffs from the suit schedule property without invoking due process of law.

PLAINTIFF CAN SEEK DECLARATION OF HIS RIGHT TO PROPERTY – HE CANNOT ASK FOR DECLARATION OF DEFENDANTS RIGHTS

In Samat Kumar Mitra v. Hem Chandra Dey, AIR 1961 Cal 411, it has been held that where the plaintiff does not seek for a declaration of his own right to property or his right to legal character but challenges the defendants pretensions to legal character and right to property, such a suit would be hit by Section 42 of the Specific Relief Act, 1877.

In *Jugraj Singh v. Jaswant Singh*, AIR 1971 SC 761 the Supreme Court declined to give any relief under Section 42 of the Specific Relief Act 1877 in view of the fact that the plaintiff merely asked for declaration that the defendants who were neither owners of the disputed land nor did they have right to get the same as per the orders of the S.D.O. acting as Collector without further asking for cancellation of the order or for any injunction.

In M/s. Supreme General Films Exchange Ltd., His Highness Maharaja Sir Brijnath Singhji Deo, of Malhar, AIR 1975 SC

1810, the Supreme Court held that Section 42 of the Specific Relief Act, 1877 merely gives statutory recognition to a well recognised type of declaratory relief and subjects it to a limitation. The said provision cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of Courts to give declarations of right in appropriate cases falling outside the said provision (Section 42). The circumstances in which a declaratory decree should be awarded is a matter of discretion depending upon the facts of each case. A complete stranger whose interest is not affected by another's legal character or who has no interest in another's property cannot get declaration under Section 42 with reference to the legal character of the property involved.

WHEN PLAINTIFF IS NOT IN POSSESSION MERE DECLARATION IS NOT MAINTAINABLE

In Ram Saran & Anr. v. Smt. Ganga Devi, AIR 1972 SC 2685, Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of Specific Relief Act, 1963 (hereinafter called 'Specific Relief Act') and, thus, not maintainable.

In Vinay Krishna v. Keshav Chandra & Anr., AIR 1993 SC 957, Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the

proviso to Section 34 of the Specific Relief Act. (See also: *Gian Kaur v. Raghubir Singh*, (2011) 4 SCC 567).

WHEN PLAINTIFF IS NOT IN POSSESSION AS ON THE DATE OF SUIT - WITHOUT SEEKING BACK POSSESSION - DECLARATION AND P.I. SUIT NOT MAINTAINABLE.

THE HON'BLE JUSTICE N. KUMAR of Karnataka High Court in the case of *Sri Aralappa ... vs Sri Jagannath* Reported in AIR 2007 Kant 91, ILR 2007 KAR 339 In a suit, for declaration of ownership and permanent injunction, not only the plaintiff has to prove his title to the property, but also his possession over the property on the date of the suit. When the plaintiff is not in possession of the property on the date of the suit, relief of permanent injunction is not on appropriate consequential relief. The appropriate relief consequential to declaration of ownership would be recovery of possession of the property. When the plaintiff is out of possession of the property and does not seek relief for possession, a mere suit for declaration is not maintainable. The reason is not far to seek. It is well settled that no Court would grant any relief which is not useful, or futile and not effective. If title of the plaintiff is to be declared and he is not in possession and possession is with the defendant or some other person, the plaintiff would be having title of the property and the person in possession would be having possessory title to the property. It would lead to anomalous situation and create confusion in the public, which is to be avoided.

31. Even if the plaintiff comes to Court asserting that he is in possession and that if it is found after trial that he was not in

possession on the date of the suit, even then, the suit for declaration and permanent injunction is liable to be dismissed as not maintainable, as no decree for permanent injunction can be granted if the plaintiff is not in possession on the date of the suit. In such circumstances, it is necessary for the plaintiff to amend the plaint before the judgment and seek relief of possession. Therefore, a suit for declaration of title and permanent injunction, by the plaintiff who is not in possession on the date of the suit, when he is able to seek further relief of recovery of possession also, omits to do so the Court shall not make any such declaration and the suit is liable to be dismissed as not maintainable.

A Division Bench of this Court in the case of Poojair Puttaiah and Ors. v. Kempaiah reported in ILR 1980 KAR 103 has held that in a suit for declaration of ownership and permanent injunction, not only the plaintiff must prove his title, but also his possession over the property, on the date of the suit. When the plaintiff is not in possession of the property on the date of the suit, the relief of permanent injunction is not an appropriate consequential relief. The appropriate relief consequential to declaration of ownership, is relief of possession of the property. The proviso to Section 34 of the Specific Relief Act, 1963, also affirms the said view. Where the plaintiff is out of possession of the land and does not seek relief for possession, a mere suit for declaration is not maintainable.

The Supreme Court in the case of Vinay Krishna v. Keshav Chandra and Anr **AIR 1993 SC 957**, 1993 Supp (3) SCC

129 held that the plaintiff is not in exclusive possession of the property and defendants and other tenants were in occupation of the property, the relief of possession ought to have been asked for as a consequential relief to the relief of declaration. The failure to do so undoubtedly bars the discretion of the Court in granting the decree of declaration. Merely because, the plaint says in the prayer column such other relief may be granted to the plaintiff, it does not mean that without a specific plea for possession and disregarding the bar under Section 42 (proviso) of the Specific Relief Act, the suit could be decreed even with reference to the portions of which the plaintiff has been in possession.

TITLE DECLARATION

Supreme Court in the case of Union of India and Others v. Vasavi Cooperative Housing Society Limited and Others, MANU/SC/0001/2014 : (2014) 2 Supreme Court Cases 269 has held that "in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not."

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**CHAPTER
PROPERTY**

**TRANSFER OF PROPERTY ACT IS NOT AFFECTED BY
PERSONAL LAW**

RADHAKISHAN LAXMINARAYAN TOSHNIWAL vs. SHRIDHAR RAMCHANDRA ALSHI AND OTHERS reported in AIR 1960 SC 1368, wherein it is held that the transfer of property, where the Transfer of Property Act applies, has to be under the provisions of the said Act only; the Mohammedan Law of transfer of property cannot override the statutory law. It has expressed the considered view that wherever the Transfer of Property Act is in force, the Mohammedan Law or any other personal law is inapplicable to the transfer of properties, this judgment is followed subsequently by the Hon'ble Apex Court in the case of KUMAR GONSUSAB vs. MOHAMMED MIYAN URF BABAN reported in AIR (SCW) - 2008-0-6311.

Mahanth Ram Das v. Ganga Das, [1961] 3 SCR page 763 it was held: "Even in cases where an order is made by the Court for doing a thing within a particular time and the order further provides that the application, suit or appeal shall stand dismissed if the thing is not done within the time fixed, the Court has jurisdiction, if sufficient cause is made out, to extend the time even when the application for extension of time is made after the expiry of the time fixed. It is not the application for grant of further time, whether made before or after the expiry of the time granted, which confers jurisdiction on the Court. The Court possesses the jurisdiction under Sec. 148 CPC to enlarge the time and the application merely invokes that jurisdiction."

In Ganesh Prasad Sah Kesari and Another v. Lakshmi Narayan Gupta, [1985] 3 SCC page 53 it was held: " where the court fixes a time to do a thing, the court always retains the

power to extend the time for doing so. Section 148 of the Code of Civil Procedure provides that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the Code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. The principle of this section must govern in not whittling down the discretion conferred on the court."

WHEN AGENT WANTS TO SELL PROPERTY BASED ON POWER OF ATTORNEY IT SHOULD HAVE BEEN EXECUTED AND AUTHENTICATED AS DISCLOSED SECTION 33 REGISTRATION ACT 2009 SC

**RAJNI TANDON VS DULAL RANJAN GHOSH DASTIDAR & ANR
2009 (11) SCR 686 = 2009 (14) SCC 782 = 2009 (11) JT 666
= 2009 (10) SCALE 402**

Clause (a) of Section 32 specifies that a document can be presented for registration (i) by the person executing the document; (ii) any person claiming under the document presented for registration and (iii) in the case the said document is a copy of a decree or order, any person claiming under the decree or order.

Clause (b) and (c) deal with cases where the document is presented not by any person mentioned in (i), (ii) and (iii) of sub clause (a) but by their agent, representative or assign.

This is so because the use of the words "such person" in clause (b) and (c) can be understood to mean only persons as referred to in (i), (ii) and (iii) above. In so far as clause (c) of Section 32 is concerned, the agents, representative or assigns of the persons referred to in (i), (ii) and (iii) can present the said document for registration only if they are duly authorized by power-of-attorney and executed and authenticated. The words "executed and authenticated in Section 32 (c) would mean the procedure specified in Section 33.

The object of registration is designed to guard against fraud by obtaining a contemporaneous publication and an unimpeachable record of each document. The instant case is one where no allegation of fraud was raised. In view thereof the duty cast on the Registering Officer under Section 32 of the Act was only to satisfy himself that the document was executed by the person by whom it purports to have been signed. The Registrar upon being so satisfied and upon being presented with a document to be registered had to proceed with the registration of the same. Where a deed is executed by an agent for a principal and the same agent signs, appears and presents the deed or admits execution before the Registering Officer, that is not a case of presentation under Section 32 (c) of the Act. The provisions of Section 33 will come into play only in cases where presentation is in terms of Section 32 (c) of the Act. In other words, only in cases where the person signing the document cannot present the document before the registering officer and gives a power of attorney to another to present the document that the provisions of Section 33 get attracted. It is only in such a

case, that the said power of attorney has to be necessarily executed and authenticated in the manner provided under Section 33 (1) (a) of the Act.

CONCLUSION:- When a person residing in india where the registration act applies, if he executes GPA to sell his property, in order to have legality it should be executed before Registrar or Subregistrar of the place where he resides. Without such valid GPA, notary GPA is not valid.

In City Bank, N.A. v. Standard Chartered Bank and others reported in (2004) 1 SCC 12, the Hon'ble Supreme Court holds "novation, recession or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties to the contract. Both the parties have to agree to set aside the original contract with the new contract or for recession or for alteration." Thus, it is now too well settled that a cancellation deed, which is executed unilaterally by one party to the contract is illegal.

Court in Smt. Dularia Devi v. Janardan Singh & Ors. [AIR 1990 SC 1173], wherein Supreme Court held that when a representation has been made in regard to the character of a document, the deed would be totally void.

WHEN SOME ONE REGISTERS SALE DEED OF REAL OWNERS PROPERTY-WITHOUT AUTHORISATION, CONSEQUENCES AND OPTIONS LEFT TO REAL OWNER

JUSTICE R Raveendran in the case of M. Ramakrishna Reddy vs Sub-Registrar, Rajajinagar, AIR 2000 Kant 46, ILR 1999

KAR 2033 In view of the above, when a person who claims to be the owner or a person interested in an immovable property, finds that someone else has executed and registered a sale deed or other deed in regard to his property, claiming to be the owner or a person interested in the property, the appropriate course for him is to file a suit for declaration and consequential reliefs. If he is satisfied such sale deed is executed by a person without any title and that the deed is void ab initio, he may even choose to ignore the same and leave it to the person claiming title under such deed to establish his title in appropriate proceedings. A Court of Law has the jurisdiction to declare a document to be void or even cancel a document. But under no circumstances, a person claiming to be the owner of a property or a holder of a property, can require the Registering Authority to cancel the registration of a document or to cancel the entry made in Book No. 1 in regard to a registered document or to delete or remove the entry made in the indexes relating to Book No. 1. The Registering Officer has no such power. Consequently, the question of the Registering Officer deleting any entry either from the Indexes of Book No. 1 or the extracts therefrom contained in the Encumbrance Certificate by holding transaction covered by a registered instrument is illegal or void, does not arise.

NO FOREIGNER IS ENTITLED TO HOLD LAND IN INDIA

Joaquim Mascarenhas Fiuza vs Smt. Jaime Rebello And Another 1986 (3) BomCR 236 Sub-section (1) of section 31, Foreign Exchange Regulation Act, 1973, provides that no person who is not a citizen of India shall, except with the previous general or special permission of the Reserve Bank acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India. Therefore, it becomes clear from the said provision of law that a foreign national cannot hold any immovable property situate in India whatever is the means by which the said property that every person who is not a citizen of India and who was holding at the commencement of the Act any immovable property situate in India shall, within the period specified therein, make a declaration regarding the immovable property or properties held by him. Reading sub- sections (1) and (4) together and bearing in mind the word "otherwise" occurring in sub-section (1), it would appear that irrespective of the manner or the reason why an immovable property situate in India came to be held by a foreign national, the same can be held within the meaning of the Act only if he complies with the requirements of the Act. In other words, if the foreigner had already acquired and was having title and possession over a particular property at the commencement of the Act, he will be entitled to continue to hold it only if he makes the declaration as required by sub-section (4). (AFTER FEMA ACT SOME MODIFICATIONS & SOME CHANGES HAVE BEEN MADE)

IDENTIFICATION OF PROPERTY

Honourable Apex Court reported in 2006(5) SCC 466 Subhaga & Ors vs Shobha & Ors That a property can be identified either by boundary or by any other specific description is well established. Here the attempt had been to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail. There was no occasion to spin a theory that it was necessary in this suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff.

Hon'ble Apex Court reported in AIR 1963 SC 1879 (Sheodhyan Singh and others v. Mst.Sanichara Kuer and others) it has been categorically found as follows:- "7.... In these circumstances, we are of opinion that the High Court was right in holding that this is a case of misdescription only and that the identity of the property sold is well established, namely, that it is plot No.1060. The matter may have been different if no boundaries had been given in the final decree for sale as well as in the sale certificate and only the plot number was mentioned . But where we have both the boundaries and the plot number and the circumstances are as in this case, the mistake in the plot number must be treated as a mere misdescription which does not affect the identity of the property sold. The contention of the appellants therefore with respect to this plot must fail."

Anathula Sudhakar vs. P. Buchi Reddy (Dead) by L.Rs. & Ors. AIR 2008 SC 2033 wherein it was held that when the suit property comprises of vacant land, and the rival claimants plead their possession thereon, the person who proves his title must succeed.

In Lalmuni Devi's case, supra, AIR 1980 Patna 184 Division Bench of the Patna High Court was considering the scope of Section 47 of the Code of Civil Procedure and also examined the meaning of the expression "such step". That was a case where the application was preferred for appointment of a commissioner to ascertain the identity of the property in terms of the decree. Contention was raised stating that the executing Court has no jurisdiction to take additional evidence to find out the properties in the suit. Repelling the contention the Court held that the executing Court is certainly entitled in law to take such steps to effect delivery of possession in terms of the decree under execution. It was also held "such steps" would not amount to taking any additional evidence in the matter but would amount simply to ascertain and fix up the identity of the property in terms of the decree itself.

In Madhukar Trimbak Gore's case, supra, AIR 1983 Bombay 277 the Court was examining the scope of order XXIII, Rule 3, C.P.C. That was a case where a compromise decree was sought to be executed. The executing Court had that decree was not executable on the ground that the terms of the compromise contained in the decree did not relate to the suit which was for

permanent injunction and such a decree could not be made because of the provisions contained in Order XXIII, Rule 3. Further it was also held that the decree could not be executed for the reason that the house to which it related was not in existence. Reversing the decision of the executing Court, the High Court held that the executing Court could not go behind the decree. It was also held that when in execution a question arises as to the identity of the property of which possession has to be delivered to the decree holder, obviously such a question would relate to the execution of the decree and it would be for the executing Court to decide it as required by Sub-section (1) of Section 47 of the Code. The Court held that the executing Court would do well to hold proper enquiry and determine the question with regard to the identity of the property which has to be delivered to the applicant. Similar is the view taken in *Rahim Bux v. Mohammad Shafi*, AIR 1971 All 16.

In Chacko Geevarghese's case, supra AIR 1982 Kerala 333 learned judge was examining the question of executing arbitration award. The Court held that merely because in the execution of the decree, the executing Court has to ascertain the actual amount provided under the decree, it cannot refuse to execute such decree and ascertainment of the property in execution, where it is the subject matter of the decree in permissible.

In Kassim Beevi's case, supra AIR 1987 Kerala 226 the Court after examining the question of execution of a decree for specific

performance held that the executing Court is bound to carry out and implement its decree in accordance with its tenor which in turn would imply that the property should be correctly described with the proper boundaries. It is not as if by doing so the Court is traversing beyond the decree or causing any prejudice to any of the parties or conveying property not agreed to be, conveyed.

Supreme Court in the case of Jai Narain Ram Lundia v. Kedar Nath Khetan 1956 AIR 359, 1956 SCR 62, where the Supreme Court held that "The executing court has to see that the defendant gives the plaintiff the very thing that the decree directs and not something else, so if there is any dispute about its identity or substance nobody but the court executing the decree can determine it. It is a matter distinctly relating to the execution, discharge and satisfaction of the decree and so, under S. 47, Civil P.C. it can only be determined by the Court executing the decree". In this case, where the decree directed that "against payment or tender by the plaintiffs..... the said defendants..... do execute in favour of the plaintiffs proper deed or deeds of transfer" and in this case, "when a decree imposes obligations on both sides which are so conditioned that performance by one is conditioned on performance by the other, execution will not be ordered unless the party seeking execution not only offers to perform his side but, when objection is raised, satisfies the executing court that he is in a position to do so. Any other rule would have the effect of varying the conditions of the decree; a thing that an executing court cannot do."

T.L. Nagendra Babu vs Manohar Rao Pawar ILR 2005 KAR 884 Unless the Court is satisfied with regard to material details in the light of the material evidence with regard to the identification of the property, no declaration and injunction can be granted.

OWNERSHIP OF IMMOVEABLE PROPERTY

AIR 2005 SC 3708 Union of India vs Pramod Gupta (D) by LRs. & Ors.. "Ownership" in respect of an immovable property would mean a bundle of rights. Only a proprietor of a surface land will have the sub-soil right. But such rights may also have certain limitations. Tenure holder or sub-tenure holder and / or an agricultural tenant created for carrying out agricultural operation per se would not become the owner of the sub-soil right. The right granted in favour of such sub-tenure holder, tenure holder or the agricultural tenant would, thus, depend upon the concerned statute and/ or the relevant covenants contained in the grant.

DELIVER TO THE BUYER ALL DOCUMENTS OF TITLE

Section 55(3) of the T.P. Act casts an obligation on the seller, where he has received the whole of the purchase money, to deliver to the buyer all documents of title relating to the property which are in the seller's possession. The inapplicability of the proviso to Section 55(3) was not argued. Before completion the seller is bound under Section 55(1)(b) to produce all title deeds in his possession.

MERE OMISSION OF THE PLOT NUMBERS IN THE SALE DEED IS NOT OF ANY CONSEQUENCE

P.RAMMURTY .v. KALPO PATRA AND OTHERS (AIR 1963 ORISSA 136). Section 48 of the Transfer of Property Act has been dealt with in regard to priority between sale deeds of some immovable property. It is held that 'Where it is accepted that the parties really intended to convey certain immovable properties under a sale deed and possession of the said properties was in fact delivered to the vendee in pursuance of the said conveyance, the mere omission of the plot numbers in the sale deed is not of any consequence and a subsequent sale deed in favour of the plaintiff in respect of the very same property is of no avail.

ALIENATION WAS MADE BY ONE OF THE CO-OWNERS AFTER THE PRELIMINARY DECREE

AIR 2004 NOC 109 (ORISSA) between PARAMANANDA SWAIN & OTHERS .v. RABINDRANATH SWAIN & OTHERS. Section 44 of the Transfer of Property Act is dealt with in the said decision. As per the facts of the said case, the parties therein had mutually divided their properties pursuant to a decree and alienation was made by one of the co-owners after the preliminary decree came to be drawn. Therefore, it is held that alienation of his share by co-owners to third party cannot be assailed by other co-owners when co-owner has not alienated the property in excess of his share.

MORTGAGE BY CONDITIONAL SALE AND A SALE WITH A CONDITION OF REPURCHASE

Bhoju Mandal and others vs. Debnath Bhagat and others, AIR 1963 SUPREME COURT 1906, wherein it has been observed that "There is a clear legal distinction between the two concepts, a mortgage by conditional sale and a sale with a condition of repurchase. The former is a mortgage, the relationship of debtor and creditor subsists and the right to redeem remains with the debtor. The latter is an out and out sale whereby the owner transfers all his rights in the property to the purchaser reserving a personal right of repurchase. The question to which category a document belongs presents a real difficulty which can only be 10 SA_477_2017, 775_2017 solved by ascertaining the intention of the parties on a consideration of the contents of a document and other relevant circumstances. Decided cases have laid down many tests to ascertain the intentions of the parties but they are only illustrative and not exhaustive. For ascertaining the intention of the parties under one document a decision on a construction of the terms of another document cannot ordinarily afford any guidance unless the terms are exactly similar to each other."

CONDITIONAL SALE WITH OPTION TO REPURCHASE AND MORTGAGE BY CONDITIONAL SALE

Tamboli Ramanlal Motilal (dead) by L.Rs. vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and another, AIR 1992 SUPREME COURT 1236, it has been held that in clauses of deed consistent with express intention of making the transaction a conditional sale with option to repurchase then such document cannot be said to be a mortgage by conditional sale.

Vanchalabai Raghunath Ithape (D) by LR vs. Shankarrao Baburao Bhilare (D) by LR. and others, 2013 AIR SCW 3993, it has been held that a mortgage by conditional sale or sale with condition of repurchase, plaintiff transferring land to defendant by way of document of sale, defendant put in possession and used/enjoyed property as absolute owner. Further, the document containing stipulation that on receipt of sale amount defendant shall return property to plaintiff vendor. Mere stipulation of return of property in document of sale does not make the transaction mortgaged by conditional sale.

Umabai and another vs. Nilkanth Dhondiba Chavan (dead) by L.Rs. and another, 2005(4) Mh.L.J., 306, wherein it has been observed that "There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agree upon.

Proviso appended to section 58(c) of the Transfer of Property Act, however, states that if the condition for re-transfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage."

In Ramlal and Another v. Phagua and Others [(2006) 1 SCC 168], Court having regard to the peculiar fact situation obtaining therein opined: "In our opinion, agreement to reconvey the property will not ipso facto lead to the conclusion that the sale is nominal and in view of the stand of Defendant 8, as also of the fact that the property worth Rs. 700 has been purportedly sold for Rs. 400, we are of the considered opinion that the sale deed dated 1-12-1965 did not convey any title to Defendant 8. It is well settled by a catena of decisions that the vendor cannot convey to the vendee better title than she herself has."

WHEN THE OWNERSHIP AND TITLE IN A PROPERTY WILL PASS TO THE TRANSFEREE

Janak Dulari Devi and Ors. vs. Kapildeo Rai and Ors.: MANU/SC/0553/2011 Evidence Act, 1872 - Secs. 91, 92 - Where the intention of the parties is that passing of title would depend upon the passing of consideration, evidence is admissible for the purport contradicting the recital in the deed acknowledging the receipt of consideration. Transfer of Property Act, 1882 - Secs. 8, 54 - Sale deed - Title - Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the

clear intention is that title would pass and possession would be delivered only on payments of the entire sale consideration - Where the sale deed recited that on receipt of entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration or if the vendor proves that the entire sale consideration was not paid to him, title in the property would not pass to the purchaser.

In Bishundeo Narain Rai v. Anmol Devi and Ors. MANU/SC/0533/1998 : 1998 (7) SCC 498, Court had occasion to consider the question as to when the ownership and title in a property will pass to the transferee, under a deed of conveyance. This Court observed: Section 8 of the Transfer of Property Act declares that on a transfer of property all the interests which the transferor has or is having at that time, capable of passing in the property and in the legal incidence thereof, pass on such a transfer unless a different intention is expressed or necessarily implied. A combined reading of Section 8 and Section 54 of the Transfer of Property Act suggests that though on execution and registration of a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be on terms and conditions embodied in the deed indicating the intention of the parties. It follows that on execution and registration of a sale deed, the ownership title and all interests in the property pass to the purchaser unless a different intention is either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed. Such intention can be gathered by intrinsic evidence, namely, from the

averments in the sale deed itself or by other attending circumstances subject, of course, to the provisions of Section 92 of the Evidence Act, 1872.

In Kaliaperumal v. Rajagopal and Anr. MANU/SC/0421/2009 : 2009 (4) SCC 193, Court again considered the issue and held:

It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act, 1882 ("the Act", for short) defines 'sale' as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55 of the Act.Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property.The answer to the question whether the parties

intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or' ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of Evidence Act. x x x x There is yet another circumstance to show that title was intended to pass only after payment of full price. Though the sale deed recites that the purchaser is entitled to hold, possess and enjoy the scheduled properties from the date of sale, neither the possession of the properties nor the title deeds were delivered to the purchaser either on the date of sale or thereafter. It is admitted that possession of the suit properties purported to have been sold under the sale deed was never delivered to the Appellant and continued to be with the Respondents. In fact, the Appellant, therefore, sought a decree for possession of the suit properties from the Respondents with mesne profits. If really the intention of the parties was that the title to the properties should pass to the Appellant on execution of the deed and its registration, the possession of the suit properties would have been delivered to the Appellant.

Janak Dulari Devi and Ors. vs. Kapildeo Rai and Ors.:
MANU/SC/0553/2011 Where the sale deed recites that on receipt of the total consideration by the vendor, the property was

conveyed and possession was delivered, the clear intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him, title in the property would not pass to the purchaser. At this stage, we may refer to the practice prevalent in Bihar known as 'ta khubzul badlain' (that is, title to the property passing to the purchaser only when there is "exchange of equivalents"). As per this practice, where a sale deed recites that entire sale consideration has been paid and possession has been delivered, but the Registration Receipt is retained by the vendor and possession of the property is also retained by the vendor, as the agreed consideration (either full or a part) is not received, irrespective of the recitals in the sale deed, the title would not pass to the purchaser, till payment of the entire consideration to the vendor and the Registration Receipt is obtained by the purchaser in exchange. In such cases, on the sale deed being executed and registered, the registration receipt (which is issued by the Sub-Registrar) authorizing the holder thereof to receive the registered sale deed on completion of the registration formalities, is received and retained by the vendor and is not given to the purchaser. The vendor who holds the Registration receipt will either receive the registered document and keep the original sale deed in his custody or may keep the registration receipt without exchanging it for the registered document from the sub-Registrar,

till payment of consideration is made. When the purchaser pays the price (that is the whole price or part that is due) on or before the agreed date, he receives in exchange, the registration receipt from the vendor entitling him to receive the original registered sale deed, as also the possession. If the payment is not made as agreed, the vendor could repudiate the sale and refuse to deliver the registration receipt/registered document, as the case may be, which is in his custody, and proceed to deal with the property as he deems fit, by ignoring the rescinded sale. An 'encumbrance' is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. [See *National Textile Corporation vs. State of Maharashtra* - AIR 1977 SC 1566 and *State of H.P. vs. Tarsem Singh* - 2001 (8) SCC 104]. Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance. The MOUs said to have been executed by respondents 1 to 3 provide that agreements of sale with mutually agreed terms and conditions will be entered between the parties after clearance of all pending or future litigations. Therefore the MOUs are not even agreements of sale.

Vimal Chand Ghevarchand Jain and Ors. vs. Ramakant Eknath Jajoo: MANU/SC/0441 /2009 The deed of sale being a registered one and apparently containing stipulations of transfer of right, title and interest by the vendor in favour of the vendee, the onus of proof was upon the defendant to show that the said

deed was, in fact, not executed or otherwise does not reflect the true nature of transaction. Evidently, with a view to avoid confrontation in regard to his signature as an attesting witness as also that of his father as vendor in the said sale deed, he did not examine himself. An adverse inference, thus, should have been drawn against him by the learned Trial Court. It is for the aforementioned purpose, the deed of sale was required to be construed in proper perspective. Indisputably, the deed of sale contained stipulations as regards passing of the consideration, lawful title of the vendor, full description of the vended property, conveyance of the right, title, interest, use, inheritance, property, possession, benefits, claims and demands at law and in equity of the vendor. The said clause uses the terms "granted, released, conveyed and assured or intended or expressed so to be with their and every of their rights, members and appurtenances unto and to the use and benefits of the said purchasers for ever subject to payment of all rent, rates taxes.... It further contains a stipulation that the purchaser had been in possession of the property and the original sale deed dated 15.7.1968 was handed over..... A document, as is well known, must be construed in its entirety. Reading the said in its entirety, there cannot be any doubt whatsoever that it was a deed of sale. It satisfies all the requirements of a conveyance of sale as envisaged under Section 54 of the Transfer of Property Act. We would, therefore, proceed on the premise that it was open to the respondent to adduce oral evidence in regard to the nature of the document. But, in our opinion, he did not discharge the burden of proof in respect thereof which was on him. The document in question was

not only a registered one but also the title deeds in respect of the properties have also been handed over. Symbolical possession if not actual physical possession, thus, must be held to have been handed over. A heavy burden of proof lay upon the defendant to show that the transaction was a sham one. It was not a case where the parties did not intend to enter into any transaction at all. Admittedly, a transaction had taken place. Only the nature of transaction was in issue. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance. The construction of the deed clearly shows that it was a deed of sale. The stipulation with regard to payment of compensation in the event appellants are dispossessed was by way of an indemnity and did not affect the real nature of transaction. Right of possession over a property is a facet of title. As soon as a deed of sale is registered, the title passes to the vendee. The vendor, in terms of the stipulations made in the deed of sale, is bound to deliver possession of the property sold. If he does not do so, he makes him liable for damages. The indemnity clause should have been construed keeping in view that legal principle in mind. Although evidences had been brought on record to show that upon grant of leave and licence, the keys of godowns had been handed over but in respect thereof no contrary findings had been arrived at. We would assume that the parties entered into an arrangement as a result whereof the father of the respondent was to continue in possession. The character of his possession, however, changed

from that of an owner to a licensee. A legal fiction in a situation of this nature is created in terms whereof the owner becomes dispossessed and regains possession in a different capacity, namely, as a licensee.

In Bishwanath Prasad Singh v. Rajendra Prasad and Anr.

MANU/SC/8062/2006 : AIR 2006 SC 2965 , this Court held:

16. A deed as is well known must be construed having regard to the language used therein. We have noticed hereinbefore that by reason of the said deed of sale, the right, title and interest of the respondents herein was conveyed absolutely in favour of the appellant. The sale deed does not recite any other transaction of advance of any sum by the appellant to the respondents which was entered into by and between the parties. In fact, the recitals made in the sale deed categorically show that the respondents expressed their intention to convey the property to the appellant herein as they had incurred debts by taking loans from various other creditors. It was furthermore observed: 19. It is of some significance to note that therein the expressions "vendor", "vendee", "sold" and "consideration" have been used. These expressions together with the fact that the sale deed was to be executed within a period of 23 months i.e. up to June 1978, evidently the expression "vaibulwafa" as a condition was loosely used. 20. Furthermore, the agreement was also executed for a fixed period. The other terms and conditions of the said agreement (ekrarnama) also clearly go to show that the parties understood the same to be a deed of reconveyance and not mortgage or a conditional sale. 21. The terminology

"vaibulwafa" used in the agreement does not carry any meaning. It could be either "bai-ul-wafa" or "bai-bil-wafa". 22. It will bear repetition to state that with a view to ascertain the nature of a transaction the document has to be read as a whole. A sentence used or a term used may not be determinative of the real nature of transaction. Despite the fact that the term 'baib-ul-wafa' was used in the transaction, this Court held that the document in question was a deed of reconveyance and not a mortgage with conditional sale, stating:23. Baib-ul-wafa, it was held by the trial court connotes only an agreement for sale. In terms of Section 91 of the Evidence Act, if the terms of any disposition of property is reduced to writing, no evidence is admissible in proof of the terms of such disposition of property except the document itself.

EXECUTION AND REGISTRATION OF THE DEED OF CANCELLATION

**In BINNY MILL LABOUR WELFARE HOUSE
BUILDING CO-OPERATIVE SOCIETY LIMITED
Vs. D.R.MRUTHYUNJAYA ARADHYA - (ILR 2008 KAR 2245), it**

has been held as under: " Unilaterally he cannot execute what is styled as a deed of cancellation, because on the date of execution and registration of the deed of cancellation, the said person has no right or interest in that property. Normally what can be done by a Court can be done by the parties to an instrument by mutual consent. Even otherwise if the parties to a document agree to cancel it by mutual consent for some reason and restore status quo ante, it is possible to execute such a deed. An agreement of sale, lease or mortgage or partition may be cancelled with the consent of the parties thereto. Because in the case of agreement of sale, lease, mortgage or partition, each of the parties to the said document even after the execution and registration of the said deed retains interest in the property and, therefore, it is permissible for them to execute one more document to annul or cancel the earlier deed. However, it would not apply to a case of deed of sale executed and registered. In the case of a sale deed executed and registered, the owner completely loses his right over the property and the purchaser becomes the absolute owner. It cannot be nullified by executing a deed of cancellation because by execution and registration of a sale deed,

the properties are being vested in the purchaser and the title cannot be divested by mere execution of a deed of cancellation. Therefore, even by consent or agreement between the purchaser and the vendor, the said sale deed cannot be annulled. If the purchaser wants to give back the property, it has to be by another deed of conveyance. If the deed is vitiated by fraud or other grounds mentioned in the Contract Act, there is no possibility of parties agreeing by mutual consent to cancel the deed. It is only the Court which can cancel the deed duly executed, under the circumstances mentioned in Section 31 and other provisions of the Specific Relief Act, 1963. Therefore, the power to cancel a deed vests with a Court and it cannot be exercised by the vendor of a property."

In SRI. K. RAJU VS. BANGALORE DEVELOPMENT AUTHORITY (ILR 2011 KAR 120), it has been held as under: "

It is thus clear that when the sale deed executed and registered, the owner completely loses his right over the property and the purchaser becomes the absolute owner. It cannot be nullified by executing a deed of cancellation because by execution and registration of a sale deed, the properties are being vested in the purchaser and the title cannot be divested by mere execution of a deed of cancellation. Therefore, even by consent or agreement between the purchaser and the vendor, the said sale deed cannot be annulled. If the purchaser wants to give back the property, it has to be by another deed of conveyance. If the deed is vitiated by fraud or other grounds mentioned in the Contract Act, there is no possibility of parties agreeing by mutual consent to cancel the

deed. It is only the Court which can cancel the deed duly executed, under the circumstances mentioned in Section 31 and other provisions of the Specific Relief Act, 1963. Therefore, the power to cancel the deed vests with a Court and it cannot be exercised by the vendor of a property. After execution and registration of the sale deed, the BDA cannot determine the validity of the sale deed. It can neither execute a cancellation deed unilaterally.

Polamrasetti Manikyam and Ors. vs. Teegala Venkata Ramayya and Ors.: MANU/SC/0123/2014 - In a suit for cancellation of sale deed executed for a specified amount, the Court Fee would be paid on the consideration amount and not on the basis of the market value of the property that prevails at the time of presenting the plaint.

ATTORNEY CANNOT USE THE POWER OF ATTORNEY FOR HIS OWN BENEFIT

In State of Rajasthan v. Basant Nahata MANU/SC/0547/2005 : (2005) 12 SCC 77, Court held: (SCC pp. 90 & 101, paras 13 & 52)

13. A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by

the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.....

52. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers of Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee.

An attorney-holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

PARTY TO SEEK CANCELLATION OF DEED AFFECTING HIS RIGHTS

Yanala Malleshwari And Ors. vs Ananthula Sayamma And Ors.
AIR 2007 AP 57, -

A sale of immovable property is a contract, which gives an individual civil right to the buyer, if such sale is in accordance with entrenched common law principles. The Indian Contract

Act, 1872, Specific Relief Act and Transfer of Property Act, essentially deal with, among others - the contract of sale. The Indian Evidence Act, the Registration Act and the Stamp Act form the trinity of procedural and adjutant law in respect of sale whereas the three Acts referred to before form the trinity of substantive law of contract of sale.

Chapter II of TP Act contains two parts. Part-A deals with "Transfer of property whether movable or immovable" (Sections 5 to 34). Part-B deals with "Transfer of immovable property" (Sections 38 to 53-A). As per Section 4 of TP Act, all the provisions relating to contract in the TP Act shall be taken as part of the Indian Contract Act and Section 54 (Paragraphs 2 and 3), Sections 59, 107 and 123 of TP Act shall be read as supplemental to the Registration Act. Chapter III of the TP Act contains Sections 54 to 57. All these provisions deal with "sale of immovable property".

What would happen when the transfer is made by a person without any valid title? What would be the situation when a sale takes place by reason of the fraud played by the transferor and transferee, which drastically affects the person with absolute title and ownership? In situations such as these, does the law contemplate only remedy of seeking declaration or cancellation of the fraudulent transfer deed or does it enable the true owner to execute a deed nullifying the fraudulent transfer deed? When Sections 7 and 8 of TP Act contemplate that only person is competent to contract and entitled to transfer property can transfer, any other transfer (otherwise than as contemplated under Section 7 of the TP Act) must be treated as void. Likewise,

if a transferee reserves power to himself to revoke the transfer, such transfer/sale is not rendered void (in view of Sections 10 and 11) but the transferor can even revoke the sale deed without going to any Court.

Sections 13, 14, 15, 16, 17, 18 and 19 of Contract Act define and explain the terms often used in the law of contract, namely, "consent", "free consent", "coercion", "undue influence", "fraud" and "misrepresentation" respectively. Sections 20, 24 to 30 describe the agreements/contracts, which are void. These are: (a) where both parties to an agreement are under a mistake as to the matter of fact essential to the agreement; (b) if the consideration and object of a contract is unlawful, [1. Section 23 enumerates considerations and objects which are lawful or which are not lawful]; (c) an agreement without consideration is void subject to certain exceptions contained in Section 25; (d) agreement in restraint of marriage of a person other than a minor; (e) an agreement restraining the other from exercising a lawful profession, trade or business; (f) an agreement which restrains other party from enforcing the rights by taking legal proceedings in the Courts/Tribunals and (g) agreements by way of wager and agreement the meaning of which is not certain or capable of being made certain. Chapter IV of the Contract Act deals with the contracts, which must be performed. This chapter contains provisions regarding the contracts to be performed, by whom to be performed, time and place for performance, performance of reciprocal promises and appropriation of payments and contracts which need not be performed. Section 65 of the Contract Act lays down that when a contract becomes void,

any person who has received any advantage under such contract is bound to restore it to the person from whom it was received. These principles cannot be ignored while dealing with the transfer of property, which is void for any of the reasons noticed hereinabove.

Under Section 17 of Specific Relief Act, a contract to sell any immovable property cannot be specifically enforced in favour of vendor, who knowing himself not to have any title to the property has contracted to sell the property. Similarly, when vendor enters into contract believing that he had a good title to the property but cannot at the time fixed by the parties give the purchaser the title free from reasonable doubt, the same cannot be enforced. Whether a person who suffers injury by reason of such void instrument has to necessarily seek cancellation of such instrument? Is it necessary that a person who suffers injury by reason of transfer of immovable property (contract), which is between two persons in respect of his own property and which is void on the face of it for the reason that the vendor of the said transaction has no authority to transfer the property to the vendee, to file a suit? Can he not execute and register a deed cancelling the offending sale deed?When a suit for cancellation of an instrument/deed or document is maintainable? When such a suit at the instance of original owner is not maintainable and what are the other remedies to such a person? **Sections 31 and 34 of Specific Relief Act** are relevant and read as under.

31. When cancellation may be ordered:

(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

34. Discretion of Court as to declaration of status or right:-

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation:-A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee.

It is a misconception that in every situation, a person who suffers injury by reason of a document can file a suit for cancellation of such written statement. Two conditions must exist before one invokes Section 31 of Specific Relief Act. -These are:

the written instrument is void or voidable against such person; and such person must have reasonable apprehension that such instrument if left outstanding may cause him serious injury. Insofar as Section 34 of the Specific Relief Act is concerned, it is no doubt true that a person entitled to any right as to any property can seek declaration that he is so entitled to such right. Here again, the person who claims the right to property can institute a declaration suit only when the defendant denies or interested to deny the title of the plaintiff. The difference between the two situations is glaring. In one case, cancellation of deed can be sought in a Court only by a person who executed document and who perceives that such document is void or voidable. In the other case, even if a person is not a party to the document, he can maintain a suit for declaration.

A Full Bench of Madras High Court in Muppudathi v. Krishnaswami AIR 1960 Mad. 1 (FB), considered the scope of Sections 39 and 41 of Specific Relief Act, 1877 (which are now Sections 31 and 33 of 1963 Act). The principle entrenched in Section 39 was explained thus: The principle is that such document though not necessary to be set aside may, if left outstanding, be a source of potential mischief. The jurisdiction under Section 39 is, therefore, a protective or a preventive one. It is not confined to a case of fraud, mistake, undue influence etc. and as it has been stated it was to prevent a document to remain as a menace and danger to the party against whom under different circumstances it might have operated. A party against whom a claim under a document might be made is not bound to wait till the document is used against him. If that were so he

might be in a disadvantageous position if the impugned document is sought to be used after the evidence attending its execution has disappeared. Section 39 embodies the principle by which he is allowed to anticipate the danger and institute a suit to cancel the document and to deliver it up to him. The principle of the relief is the same as in quia timet actions. It was further laid down as under.

The provisions of Section 39 make it clear that three conditions are requisite for the exercise of the jurisdiction to cancel an instrument: (1) the instrument is void or voidable against the plaintiff; (2) plaintiff may reasonably apprehend serious injury by the instrument being left outstanding; (3) in the circumstances of the case, the Court considers it proper to grant this relief of preventive justice. On the third aspect of the question the English and American authorities hold that where the document is void on its face the Court would not exercise its jurisdiction while it would if it were not so apparent. In India it is a matter entirely for the discretion of the Court.

The question that has to be considered depends on the first and second conditions set out above. As the principle is one of potential mischief, by the document remaining outstanding, it stands to reason the executant of the document should be either the plaintiff or a person who can in certain circumstances bind him. It is only then it could be said that the instrument is voidable by or void against him. The second aspect of the matter emphasizes that principle. For there can be no apprehension if a mere third party, asserting a hostile title creates a document. Thus relief under Section 39 would be granted only in respect of

an instrument likely to affect the title of the plaintiff and not of an instrument executed by a stranger to that title.

The Full Bench of Madras High Court noticed that when the instrument/ document is not executed by the plaintiff, the same does not create a cloud upon the title of the true owner nor does it create apprehension that it may be a source of danger. Accordingly, a suit for cancellation of instrument by a person who did not execute the document would not lie. However, there could be cases where instruments are executed or purported to be executed by a party or by any person who can bind him in certain circumstances. As pointed out by the Madras High Court, these are: a party executing the document or principal in respect of a document executed by his agent, or a minor in respect of document executed by his guardian de jure or de facto, the reversioner in respect of a document executed by the holder of the anterior limited estate, a real owner in respect of a document executed by a benamidar. In these cases, though the party may not have executed document, if those are allowed to stand, it may become a potential source of mischief and danger to the title and a suit would, therefore, be maintainable for cancellation of such document. When the document itself is not executed by the plaintiff, there is no necessity to have the document cancelled by a Court decree, for it has no effect on the title of true owner.

In Debt Prasad v. Maika , AIR 1972 All 376 a learned Single Judge of Allahabad High Court placing reliance on Full Bench decision of Madras High Court in Muppudathi (supra), observed as under: In all these cases there is no question of a document by a stranger to the title as in the present case and it

can further be found that in all such cases a reasonable apprehension can be entertained that if such an instrument is left outstanding the same may cause the plaintiff serious injury. In the present case, it cannot be successfully maintained that a reasonable apprehension can be entertained by the plaintiffs that if the sale-deed is left outstanding it may cast a cloud upon their title or cause them serious injury because the cloud upon their title will not be removed merely by a decree for cancellation of the instrument. The cloud will continue to hang over the plaintiffs by the hostile assertion of title by the executant of the sale-deed and those who claim a title to it. Therefore, the proper relief for the plaintiffs to seek in a case of this kind is a declaration of their own title or a declaration that the executant of the sale-deed in dispute has no title to the property.

The law, therefore, may be taken as well settled that in all cases of void or voidable transactions, a suit for cancellation of a deed is not maintainable. In a case where immovable property is transferred by a person without authority to a third person, it is no answer to say that the true owner who has authority and entitlement to transfer can file a suit under Section 31 of the Specific Relief Act for the simple reason that such a suit is not maintainable. Further, in case of an instrument, which is void or voidable against executant, a suit would be maintainable for cancellation of such instrument and can be decreed only when it is adjudicated by the competent Court that such instrument is void or voidable and that if such instrument is left to exist, it would cause serious injury to the true owner.

The purchaser of immovable property can get the title that is passed on under the deed of conveyance by the vendor. If the title passed on is defective, the law gives the option to the purchaser to avoid such sale and sue for recovery of consideration and/or damages for breach and misrepresentation. In a situation there could also be a criminal charge against the spurious vendor for cheating under Indian Penal Code, 1860. Even in a case where the vendor has no title at all but the purchaser was made to believe that what is passed on is a valid title in the property demised under the instrument, the vendee has remedy in civil law as well as criminal law. This remedy, however, is not available to a purchaser who is negligent in not inspecting the title of the vendor and who does not insist upon such covenant or warranty. The principle of caveat emptor (let the purchaser beware), however, has no application if vendor has practised fraud to induce the purchaser to accept the offer of sale, In case of fraud, the vendor cannot maintain any action against the purchaser. What would be the remedy for the person who actually and factually holds a valid title to a property in respect of which a fraudulent transfer was effected by deceitful vendors and vendees or deceitful vendors and genuine vendees, who parted with consideration. The legal maxims 'nemo dat quod non habet' and 'nemo plus juris ad alium transferre potest quam ipse habet' postulate that where property is sold by a person who is not the owner and who does not sell under the authority or consent of the real owner, the buyer acquires no title to the property than the seller had. The Indian law recognizes this principle in various provisions of various statutes which in pith

and substance deal with Contracts, Transfer of property and Specific relief (See Sections 17, 18, 19, 20, 23, 25 and 29 of the Contract Act; Sections 6(h), 7, 25, 38, 42 to 48, 52, 53 and 55 of TP Act and Sections 13, 15, 17, 21, 31 and 34 of the Specific Relief Act). Dealing with this aspect of the matter, one of us (Justice V.V.S. Rao) in *A.K. Lakshmipathy (died) by LRs v. R.S. Pannalal Hiralal Lahoti Charitable Trust*, after making reference to Section 55 of TP Act and Section 13 of Specific Relief Act pointed out the following remedies for the transferees under fraudulent sale contracts or transfer vitiated by fraud.

(i) Where the seller transfers the property with imperfect title and subsequently acquires interest in the property, the buyer has a right to compel the vendor to make good the contract out of such interest; if necessary by compelling concurrence of other persons. Section 18 of the Specific Relief Act, 1877 except for minor variations is in pari materia with Section 13 of the New Act. The Courts have held that a defect of title is one which exposes the purchaser to adverse claims to the land and have pointed out (a) restrictive covenants, (b) encumbrances, (c) liable for the property to be satisfactorily acquired, (d) existence of partition decree allotting a portion to the co-sharer, (e) title being voidable at the option of third party and (f) the absence of concurrence of persons whose consent is necessary to validate the transfer as defects of title.

(ii) The second situation deals with a case of mortgage. When the vendor sells mortgaged property professing the same to be unencumbered, the purchaser has a right to compel the vendor

to redeem the mortgage, obtain valid discharge and also ask for conveyance from the mortgagee of the property.

(iii) In a case where the specific performance of contract cannot be enforced and the suit is dismissed by the Court on a ground of want of title or imperfect title, the buyer has a right to the return of the deposit with interest thereon and shall also have a lien in the property to the extent of the deposit, interest and costs of the suit.

Hon'ble Supreme Court in the case of Abdul Rahim & Ors. v. Sk. Abdul Zabar & Ors., **MANU/SC/ 0379/2009 : AIR 2010 SC 211** has held as follows: "A suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act. The suit, therefore, should have been filed within a period of three years from the date of knowledge of the fact that the transaction which according to the plaintiff was void or voidable had taken place."

Sita Sharan Prasad V. Manorma Devi, 2012(2) BLJ 165 has held that "a registered sale deed is presumed to have been validly executed with all its legal consequences and such document cannot be said to be void ab initio and there cannot be presumptive invalidity attached to such a transaction. Such document comes within the category of documents which remain valid, on the principle that the apparent state of affairs is the real state of affairs, until the facts invalidating the same are established."

WHETHER MORTGAGE BY DEPOSIT OF TITLE DEEDS REQUIRE REGISTRATION

Chandrakant Prabhudas Jerajani vs. Mohan Builders and Ors.: MANU/MH/1137/2020 - In view of the provisions contained in Section 59 of the Transfer of Property Act where the principal money secured is 100 Rupees or upwards a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by registered instrument signed by the mortgagor and attested by at least two witnesses. This rigour of registration and attestation does not apply to a mortgage by deposit of title-deeds. The delivery of the title-deeds with intent to create a security implies, in law, a contract between the parties to create a mortgage and thus no registered instrument is required. However, where the parties choose to reduce the contract in writing this implication of law is excluded by the express contract and the document being the sole evidence of its terms it requires registration under Section 17 of the Registration Act, 1908.

Supreme Court in the case of United Bank of India Ltd. vs. M/s. Lekharam S. & Co. MANU/SC/0370/1965 : AIR 1965 Supreme Court 1591, wherein the requirement of registration of an instrument, which evidences the mortgage by deposit of title-deeds was illuminatingly postulated. "7. A mortgage by deposit of title deeds is a form of mortgage recognised by S. 58(f) of the Transfer of Property Act which provides that it may be effected in certain towns (including Calcutta) where a person "delivers to a creditor or his agent documents of title to immovable property

with intent to create a security thereon." In other words, when the debtor deposits with the creditor title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required under S. 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under S. 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either."

Supreme Court in the case of State of Haryana and others vs. Narvir Singh and another MANU/SC/1036/2013 : (2014) 1 SCC 105. The observations of the Supreme Court in para no. 11 are instructive and thus extracted below: "11. A mortgage inter

alia means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Section 17(1)(c) of the Registration Act provides that a non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. A mortgage by deposit of title deeds in terms of Section 58(f) of the Transfer of Property Act surely acknowledges the receipt and transfer of interest and, therefore, one may contend that its registration is compulsory. However, Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument. In the face of it, in our opinion, when the debtor deposits with the creditor title deeds of the property for the purpose of security, it becomes a mortgage in terms of Section 58(f) of the Transfer of Property Act and no registered instrument is required under Section 59 thereof as in other classes of mortgage. The essence of a mortgage by deposit of title deeds is the handing over, by a borrower to the creditor, the title deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration under Section

19(1)(c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration." 14.5 By way of abundant caution and at the cost of repetition we may, however, observe that when the borrower and the creditor choose to reduce the contract in writing and if such a document is the sole evidence of terms between them, the document shall form integral part of the transaction and same shall require registration under Section 17 of the Registration Act."

CHARGE AND MORTGAGE

Supreme Court in the case of JK (Bombay) (P) Ltd. vs. New Kaisar Hind MANU/SC/0217/1968 : AIR 1970 Supreme Court 1041 in the following terms: "The distinction between a charge and a mortgage is clear. While in the case of a charge there is no transfer of property or any interest therein, but only the creation of a right of payment out of the specified property, a mortgage effectuates transfer of property or an interest therein. No particular form of words is necessary to create a charge and all that is necessary is that there must be a clear intention to make a property security for payment of money in praesenti."

Section 100 of the Transfer of Property Act, 1882 provides that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage the later person is said to have a charge on the property, and all the

provisions of the Act which apply to a simple mortgage shall, so far as may be, apply to such charge. How an ordinary charge by act of parties can be created was explained by the Supreme Court in the case of M.L. Abdul Jabbar Sahib vs. M.V. Venkata Sastri MANU/SC/0019/1969 : AIR 1969 (1) SCC 573, in the following words:

"13. The first paragraph consists of two parts. The first part concerns the creation of a charge over immovable property. A charge may be made by act of parties or by operation of law. No restriction is put on the manner in which a charge can be made. Where such a charge has been created the second part comes into play. It provides that all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The second part does not address itself to the question of creation of a charge. It does not attract the provisions of Section 58 relating to the creation of a mortgage.

16. If a non-testamentary instrument creates a charge of the value of Rs. 100/- or upwards, the document must be registered under Section 17(1)(b) of the Indian Registration Act. But there is no provision of law which requires that an instrument creating the charge must be attested by witnesses."

Supreme Court in the case of Haryana Financial Corporation vs. Gurcharan Singh and another MANU/SC/1292/2013 : (2014) 16 SCC 722, wherein the legal position was further explained. The observations in para nos. 10 and 12 are material. They read as under:

"10. An ordinary charge created under the Transfer of Property Act is compulsorily registerable. The first portion of Section 100 of the TP Act lays down that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The words "which apply to a simple mortgage shall, so far as may be, apply to such charge" in this Section were substituted by Section 53 of the Transfer of Property (Amendment) Act, 1929, for the words "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Sections 81 and 82 shall, so far as may be, apply to the persons having such charge." Evidently, the effect of the amendment was that all the provisions of the TP Act which apply to simple mortgages were made applicable to charges.

12. A conjoint reading of Section 100 with Section 59 of the TP Act makes it clear that if by act of parties, any immovable property is made security for the payment of money to another and it does not amount to mortgage, then all the provisions which apply to a simple mortgage, as far as may be, apply to such charge. Consequently, in view of Section 59 of the TP Act when there is a mortgage other than a mortgage by deposit of the title deeds, it can be effected only by a registered instrument."

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CHAPTER
ACQUISITION

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AUTHORITIES SHOULD DEPOSIT IN COURT EVEN IF LAND OWNER DOES NOT COME FORWARD IN TIME TO RECEIVE COMPENSATION OR ELSE ACQUISITION ILLEGAL

Apex Court in the case of VIJAY LATKA & ANOTHER VS. STATE OF HARYANA & OTHERS - MANU/SC/0563/2016 : (2016) 12 SCC 487, where a similar defence was taken by the Haryana Urban Development Authority (HUDA) contending that whoever had approached the HUDA, the competent authority had paid compensation and as the appellants therein had failed to approach the officer concerned requesting for payment of compensation, they could not be paid the same, the Apex Court has held as under in the said case in paragraphs 5 & 6. "5.We find this contention difficult to appreciate. When land is compulsorily acquired, it is for the requisitioning authority to make the payment and does not require the landowner to come and receive the payment.....6. As and when land is taken over by way of acquisition, the landowner has to be compensated with the amount of compensation duly determined under the Act. In case there is any dispute as to who is to be paid the amount, the same is to be deposited in court in terms of Section 31 of the 1894 Act. In this case before us, the stand of the requisitioning authority, namely, Haryana Development Authority is that the money is ready with them and it is for the land owner to come and receive the payment. This stand is not permissible under the law. It is for the authorities concerned to pay the money and take

the land and in case there is any dispute as to whom the money should be paid, then the same has to be deposited in court."

In the above case, by applying Section 24(2) of the New Act, the Apex Court has declared that the proceedings for acquisition of land stood lapsed and accordingly set aside the same as having been lapsed.

In the case of TUKARAM KANA JOSHI & OTHERS VS. M.I.D.C. & OTHERS - MANU/SC/0933/2012 : (2013) 1 SCC 353, in paragraphs 8 & 9, the Apex Court has observed as under:

"8. In the case at hand, there has been no acquisition. The question that emerges for consideration is whether, in a democratic body polity, which is supposedly governed by the Rule of Law, the State should be allowed to deprive a citizen of his property, without adhering to the law. The matter would have been different had the State pleaded that it has right, title and interest over the said land. It however, concedes to the right, title and interest of the appellants over such land and pleads the doctrine of delay and laches as grounds for the dismissal of the petition/appeal.

9. There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking

remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. Functionaries of the State took over possession of the land belonging to the appellants without any sanction of law. The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode. There is a distinction, a true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. A question then arises with respect to the authority or power under which the State entered upon the land. It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the land owner as a 'subject' of medieval India, but not as a 'citizen' under our constitution."

NO DEPOSIT MADE BEFORE TAKING POSSESSION ILLEGAL

Rajalakshmi and Ors. vs. The State of Karnataka and Ors.:
MANU/KA/2202/2017 Though these observations are made by the Apex Court in the context of a case where the State had deprived the citizen of his valuable land without acquiring the

same and without paying compensation to him, the said observations regarding right of the land looser and the obligations of the acquiring body to follow the due procedure which not only involves acquisition of land in accordance with law, but also payment of compensation as per the procedure prescribed before taking over possession are very much applicable to the instant case. If land is acquired by issuing notifications and award is passed but compensation is not paid, the harm and injury that results to the land looser is not different as compared to the utilization of land without acquisition. The latter, no doubt, is a graver form of arbitrary exercise of power completely violating the constitutional mandate under Article 300A and the other statutory provisions of the Land Acquisition Act. But merely because notifications acquiring the land had been issued, and indeed award had passed determining the compensation payable for the acquired land, action of the statutory authority cannot pass the litmus test of being just, fair and reasonable as mandated in Article 300A and as required under the statutory provisions of the Land Acquisition Act, unless compensation is paid/tendered/deposited by following due process before possession was taken. Failure to comply with this mandatory requirement, may entail very serious consequences on the acquiring body and may even in certain cases affect the very basis of acquisition. The BDA has gone ahead with the acquisition and has taken possession of the land highhandedly without paying compensation or depositing the same. Therefore, this is a clear case of highly arbitrary action. Petitioners have been deprived of the valuable

piece of land which was their source of livelihood, without any compensation. 17 years have since passed. It will be highly unjust to tell the petitioners that they should take the compensation amount determined by the Land Acquisition Officer along with interest and rest satisfied. They are entitled for payment of compensation based on the current market value along with damages..... It is hereby ordered that BDA shall treat the land as having been acquired today and pay the compensation determining the market value based on the present market value as it obtains today as per the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The market value shall be determined by passing an order within a period of 15 days from today and the same shall be paid within a period of 15 days thereafter to the petitioners. It is also open to the BDA to grant equal extent of land of similar value having similar potentiality as an alternative. The said order to be passed by the BDA shall be construed as an award for all practical and legal purposes. It is held that BDA is also liable to pay damages for the illegal use and occupation of the land in question with effect from the year 2000 which has to be assessed while passing the order. Liberty is reserved to the petitioners to approach the competent authority seeking reference of their dispute for further relief.

HIGH HANDEDNESS AND ILLEGALITY IN ACQUISITION BY BDA DEPRECIATED

Muniraju and Ors. vs. The Bangalore Development Authority and Ors.: MANU/KA/2200/2017- Court is aware of the enormous injury, loss and hardship caused to the petitioners due to the high-handed act of the statutory body like BDA. If any private body or individual had endeavoured to do the same, petitioners would have certainly initiated criminal proceedings for criminal trespass and other offences apart from approaching the Civil Court seeking restoration of their possession and for their restitution with full redressal and compensation. They have approached this Court because the offending body and the culprit is a creature of the statute controlled by the Government. That indeed makes the situation worse, because one can hardly expect such flagrant violation of rule of law by an instrumentality of the State.

ABUSE OF BDA POWER TO ACQUIRE ILLEGALLY DAMAGES ORDERED

Peddakka and Ors. vs. The Bangalore Development Authority and Ors.: MANU/KA/2201/2017 - As the BDA has un-authorisedly and illegally utilized the same, it has to compensate the petitioners and indeed restitute them in all respects which would certainly include damages for utilization of the land, apart from putting them back in the same position in which petitioners would have been had their land was not utilized. Petitioners have been robbed off their valuable assets in the form of immovable property. Such an action by an instrumentality of the State is unconceivable and incomprehensible. It shocks the conscience of

all law abiding citizens. This is a case of clear violation of Article 21 of the Constitution. Such acts of misfeasance and malfeasance if not dealt with firmly will breed disrespect for governance for the rule of law and the role of the Courts. It will be a slur on the system and rudely shake the confidence and trust of the citizen in our justice system as well. To say the least the BDA has abused its power. It has used its muscle power to encroach upon the property of the petitioners. Petitioners have been denied their legitimate rights to utilize their land and put it to best possible use for their well being and for the economic well being of their family.

CIVIL COURT HAS NO JURISDICTION TO EVALUATE ACQUISITION PROCEEDINGS LEGALITY

H.N. Jagannath and Ors. vs. State of Karnataka and Ors.: MANU/SC/1540/2017 The Division Bench has erroneously conferred jurisdiction upon the civil court to decide the validity of the acquisition. This Court has repeatedly held in a number of judgments that, by implication, the power of a civil court to take cognizance of such cases Under Section 9 of the Code of Civil Procedure stands excluded and the civil court has no jurisdiction to go into the question of validity Under Section 4 and declaration Under Section 6 of the Land Acquisition Act. It is only the High Court which will consider such matter Under Article 226 of the Constitution. So, the civil suit, per se is not maintainable for adjudicating the validity or otherwise of the acquisition notifications & proceedings arising therefrom. This Court in the

case of Bangalore Development Authority v. Brijesh Reddy and Anr. [MANU/SC/0113/2013 : 2013 (3) SCC 66] while considering the acquisition notifications issued under BDA Act observed thus: It is clear that the Land Acquisition Act is a complete code in itself and is meant to serve public purpose. By necessary implication, the power of the civil court to take cognizance of the case Under Section 9 Code of Civil Procedure stands excluded and a civil court has no jurisdiction to go into the question of the validity or legality of the notification Under Section 4, declaration Under Section 6 and subsequent proceedings except by the High Court in a proceeding Under Article 226 of the Constitution. It is thus clear that the civil court is devoid of jurisdiction to give declaration or even bare injunction being granted on the invalidity of the procedure contemplated under the Act. The only right available for the aggrieved person is to approach the High Court Under Article 26 and this Court Under Article 136 with self-imposed restrictions on their exercise of extraordinary power.

A similar view is taken by this Court in other cases. The Judgments of this Court in Laxmi Chand and Ors. v. Gram Panchayat, Kararia and Ors. [MANU/SC/0128/1996 : 1996 (7) SCC 218], Shri Girish Vyas v. State of Maharashtra [MANU/SC/1218/2011 : 2012 (3) SCC 619], State of Bihar v. Dhirendra Kumar and Ors. [MANU/SC/0384/1995 : 1995 (4) SCC 229], Commissioner, Bangalore Development Authority v. K.S. Narayan [MANU/SC/4361/2006 : 2006 (8) SCC 336] & Commissioner, Mutha Associates and Ors. v. State of Maharashtra [MANU/SC/0707/2013 : 2013 (14) SCC 304] considered the acquisition proceedings relating to the lands

which were acquired either under the provisions of the BDA Act or under the Land Acquisition Act. In all these judgments, similar question arose i.e. as to whether the civil court had jurisdiction to decide the validity of the acquisition notifications or not.

Adv - Sridhara babu N

CHAPTER INTERPRETATION AND PRECEDENTS

EXPLANATION IN STATUTE

The explanation harmonises and clears up any ambiguity or doubt when it comes to interpretation of the main provision. **In S. Sundaran Pillai and Ors. Vs. V.R. Pattabiraman & Ors. (1985) 1 SCC 591**, it was observed that explanation to a statutory provision can explain the meaning and intendment of the provision itself and also clear any obscurity and vagueness to clarify and make it consistent with the dominant object which the explanation seems to sub-serve. It fills up the gap. However, such explanation should not be construed so as to take away the statutory right with which any person under a statute has been

clothed or to set at naught the working of the Act by becoming a hindrance in the interpretation of the same.

Supreme Court in **Doypack Systems (P) Ltd. vs Union of India (1988) 2 SCC 299** went into the meaning of the phrases "pertaining to", "in relation to" and "arising out of". The court in the said case observed - "48.The expressions "pertaining to", "in relation to" and "arising out of", used in the deeming provision, they are used in the expansive sense, as per decisions of the court, meanings found in standard dictionaries and principles of broad and liberal interpretation in consonance with Article 39 (b) and (c) of the Constitution. 50. The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might have both a direct significance as well as an indirect significance depending on the context....."

BOUNDARIES SHALL PREVAIL

Sheodhyan Singh & Others v. Musammat Sanichara Kuer reported in AIR 1963 SC 1879 In the case the Court was concerned with a contradiction as to identity of land. The khata number and boundaries to the suit land in that case referred to plot No. 1060 but while making mention of it a zero was dropped and the plot No. was accordingly mentioned as 160 whereas it should have been plot No. 1060. However the boundaries of the

suit land were correctly described. Considering the discrepancies in plot number and boundaries, the Hon'ble Supreme Court held in that case that if there is dispute between plot number / dag number and boundaries of a land, it is boundaries which shall prevail.

Bhagawandas vs Roasene Jerome D' Souza ILR 1995 KAR 440, 1995 (4) KarLJ 582 That in reply to the submission of the appellant's Counsel that entire House including the disputed property has not been sold in favour of the plaintiff-respondent by the vendors and the Court below have wrongly held that property measuring 1392 sq. ft. instead of area of 928 sq.ft., learned Counsel for the respondent Sri Rao submitted that there was no error committed by Courts below and the Courts below have followed the correct principle of law while deciding the question of identity and extent of property sold by applying the doctrine to the effect that in case of description of the property in suit by area and the boundaries if there is a conflict between the two, the description by boundaries is to prevail over that area. In this connection, reliance had been placed on behalf of the respondent on Privy Council's Decision in PALESTINE PUPAT CO-OPERATIVE SOCIETY v. GOVERNMENT OF PALESTINE, AIR 1948 PC 207 as well as on a Decision in SHIV DHANASINGH v. SACHINDRA KUMAR, AIR 1963 SC 18. Shri Rao has submitted that in this view of the matter the Second Appeal deserves to be dismissed. I have applied my mind to the above arguments of Counsel for both the parties. That as regard the finding of the Courts below to the effect that property that has been sold is the

same as claimed by plaintiff in plaint and description by area is wrong and that the Courts below have rightly held that in case of conflict of description of property by area and by boundaries, the description by boundaries is to prevail, In my opinion, he has rightly and fairly acted in submitting that no serious challenge can be made to the finding of Court on the question of identity of property sold as it is well settled that in case of description of property by area and boundaries and there being conflict in the two, the description of property by the boundaries is to prevail, if boundaries are specific and well defined. Thus considered the finding of Courts below is upheld.

Madras High Court in Dharmakanny Nadar Siviseshamuthu and others v. Mahalingam Nadar Gopalakrishna Nadar and others (AIR 1963 Madras, 147) holding that when the property sold is part of a definite survey number and in the sale deed the exact boundaries of the part sold are given and the area mentioned is only approximate, the description by boundaries should prevail in ascertaining the actual property sold under the document. More or less similar view has been taken by the Apex Court in Sheodhyan Singh and others v. Mst. Sanichara Kuer and others (AIR 1963 Supreme Court, 1879)

As early as in the year 1948, the Privy Council in the case of B.K.A.P. CO-OPERATIVE SOCIETY v. GOVERNMENT OF PALESTINE AND OTHERS, 1948 PC 207 observed as follows :-
"In construing a grant of land a description by fixed boundaries is

to be preferred to a conflicting description by area. The statement as to area is to be rejected as falsi demons-ratio."

Nagpur High Court in the case of T. RAJLU NEEDY v. M.E.R. MALAR, AIR 1930 Nagpur 197 also took the same view that - "In the case of a discrepancy the dimensions and boundaries and the area specified within the boundaries will pass whether it be less or more than the quantity specified."

ILR 1988 KAR 554 in the case of Narasimha Shastry vs Mangesha Devaru, Court has ruled that where the sale deed mentioned the boundaries specifically and clearly to identify the property, the actual extent of the land not being clear, the recitals as to boundaries should prevail.

KUMAR RAMESHAR MALLA v. RAM TARAK HAZRA 1. 14 Calcutta Weekly Notes 268 which lays down that when the boundaries of a land can be ascertained with perfect certainty that an intention to convey all lands comprised within those boundaries can be inferred; and if the boundaries are uncertain the intention should be taken to be to convey the specified quantity of land within those boundaries and in that case with reference to the facts it was held that the intention was to pass the specified quantity of land only and description of the property by boundaries was discarded.

In P.Udayani Devi v. V.V.Rajeshwara Prasad Rao (AIR 1995 SC 1357), an item of property within clear boundaries was sold

in court auction and it was purchased by a stranger. The judgment debtor contended that only one house in the property was sold and another house and vacant land was not sold. The Supreme Court rejected the said contention. It was held: "7. The position in law is well settled that "certificates of sale are documents of title which ought not to be lightly regarded or loosely construed". In *Sheodhyan Singh v. Musammat Sanichara Kuer* (1962) 2 SCR 753 : (AIR 1963 SC 1879) in the sale certificate the boundaries as well as the plot number were mentioned but there was a mistake in mentioning the plot number. It was held: "The matter may have been different if no boundaries had been given in the final decree for sale as well as in the sale certificate and only the plot number was mentioned. But where we have both the boundaries and the plot number and the circumstances are as in this case, the mistake in the plot number must be treated as mere misdescription which does not affect the identity of the property sold."..... 9. According to respondent No.1 only property (II) was sold in the auction sale and is covered by the sale certificate. The plain terms of the sale certificate do not lend support to this contention. According to the sale certificate the entire property falling within the boundaries was the subject matter of the sale. In view of the said description in the sale certificate it is not possible to split up the property into two portions and confine the sale certificate to a part of the property and thereby alter the boundaries of the property that has been sold." the Supreme Court held that the question as to what was sold in execution of the decree being a question of fact, the finding made by the executing court

cannot be set aside by the High Court in the exercise of its revisional jurisdiction. It was held: "10. Moreover, it is settled law that the question as to what was sold in execution of the decree is a question of fact.In the present case, the Subordinate Judge, after an examination of the sale certificate and other documents, has recorded a finding that the entire property falling within the boundaries mentioned in the sale certificate has been sold. That was a finding of fact. The High Court, in exercise of its revisional jurisdiction, was not justified in reopening the finding of fact recorded by the Subordinate Judge. The judgment of the High Court cannot, therefore, be upheld and must be set aside."

HOW DECISIONS ARE TO BE RELIED ON BY COURTS

Apex Court in the case reported as Bharat Petroleum Corporation & Anr. vs. N. R. Vairamani & Anr. AIR 2004 SC 778, wherein it was observed: "Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant

to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not interpreted as statutes."

TOO TECHNICAL A CONSTRUCTION OF SECTIONS THAT LEAVES NO ROOM FOR REASONABLE, ELASTICITY OF INTERPRETATION SHOULD THEREFORE BE GUARDED AGAINST

In Sangram Singh v. Election Tribunal, Kotah, (AIR 1955 SC 425), their Lordships of the Supreme Court observed as under:--

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and farther its ends, not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable, elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) less the very means designed for the furtherance of justice be used to frustrate it."

..... "Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs. That proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso our

laws of procedure should be construed, wherever that is reasonably possible in the light of that principle."

PROCEDURE HAS BEEN DESCRIBED TO BE A HAND-MAID AND NOT A MISTRESS OF LAW

In State of Gujarat v. Ramprakash P. Puri ((1970) 2 SCR 875) their Lordships stated :- "Procedure has been described to be a hand-maid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demands a construction which would promote this cause."

EVERY STATUTORY PROVISION REQUIRES STRICT ADHERENCE, FOR THE REASON THAT THE STATUTE CREATES RIGHTS IN FAVOUR OF PERSONS CONCERNED

Sahdeo alias Sahdeo Singh v. State of Uttar Pradesh & Ors., (2010) 3 SCC 705 "Every statutory provision requires strict adherence, for the reason that the Statute creates rights in favour of persons concerned. The impugned judgment suffered from non-observance of the principles of natural justice and not ensuring the compliance of Statutory Rules, 1952. Thus, the trial itself suffered from material procedural defect and stood vitiated. The impugned judgment and order, so far as the conviction of the appellants in Contempt proceedings are concerned, is liable to be set aside."

QUOTING WRONG PROVISION IN APPLICATION DOES NOT PRECLUDE COURT FROM CONSIDERING IT IN WRIGHT PROVISION

Smt. K. Lakshmamma vs T.M. Rangappa And Ors. ILR 2003 KAR 5072 “It is well settled that mere fact that a wrong provision of law has been quoted would not disable the Court from deciding the matter in substance when the intention of parties is clear as it is well settled that though an application is taken out under Order 20 Rule 12 CPC, still it does not necessarily mean that the application should be dealt with by the Court only under that Order and Rule. If a mistake has been committed in mentioning a provision of law under which an application is made, it does not preclude the Court from deciding the matter under the correct provision of law, namely, Order 20 Rule 18.....”

TILL THE LEGISLATURE CORRECTS THE MISTAKE, THE WORDS ‘PLAINTIFF'S WITNESSES’ WOULD BE READ AS ‘DEFENDANT'S WITNESSES’ IN ORDER VII RULE 14(4).

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

In **Order VII Rule 14(4)** the words ‘plaintiff's witnesses’ have been mentioned as a result of mistake seems to have been committed by the legislature. The words ought to be ‘defendant's

witnesses'. Till the legislature corrects the mistake, the words 'plaintiff's witnesses' would be read as 'defendant's witnesses' in Order VII Rule 14(4).

CURTAILMENT OF REVISIONAL JURISDICTION OF THE HIGH COURT UNDER SECTION 115 OF THE CODE - COULD NOT HAVE TAKEN AWAY THE CONSTITUTIONAL JURISDICTION

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of revisional jurisdiction of the High Court under Section 115 of the Code as amended by Amendment Act 46 of 1999 does not take away and could not have taken away the constitutional jurisdiction of the High Court. The power exists, untrammelled by the amendment in Section 115 and is available to be exercised subject to rules of self-discipline and practice which are well settled.

TOO TECHNICAL CONSTRUCTION OF SECTIONS THAT LEAVES NO ROOM FOR REASONABLE ELASTICITY OF INTERPRETATION SHOULD THEREFORE BE GUARDED AGAINST PROVIDED ALWAYS THAT JUSTICE IS DONE TO BOTH SIDES

In Sangram Singh v. Election Tribunal Kotah & Anr. [AIR 1955 SC 425], considering the provisions of the Code dealing with the trial of the suits, it was opined that: "Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

JUDICIAL PROCEEDINGS CANNOT BE USED TO PROTECT OR TO PERPETUATE A WRONG

Shiv Kumar Chadha v. MCD (1993 (3) SCC 161) wherein it was observed that injunction is discretionary and that: "Judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court".

Mahadeo Savlaram Sheike v. Pune Municipal Corporation (1995 (3) SCC 33) "It is settled law that no injunction could be granted against the owner at the instance of a person in unlawful possession."

DOCUMENT MUST BE READ IN ITS ENTIRETY AND THAT THE INTENTION OF THE PARTIES MUST BE GATHERED FROM THE DOCUMENT ITSELF

In P.S.Ranakrishna Reddy vs. M.K.Bhagyalakshmi and another {2007 (10) SCC 231}, a contention was raised that the transaction was a loan transaction and not an Agreement of Sale. But the said contention was rejected by the Supreme Court on the ground that the document in question was described as an Agreement of Sale; that the Agreement disclosed negotiations between the parties and that no part of the Agreement contained an indication that it was not intended to be acted upon. Therefore in paragraph-13, the Court reiterated the well settled principle that a document must be read in its entirety and that the intention of the parties must be gathered from the document itself. The Court further held that a default clause contained in the document would not make it a contract of loan.

PER INCURIAM

State of U.P. v. Synthetics and Chemicals Ltd.
MANU/SC/0616/1991 : 1991 (4) SCC 139, this Court in
paragraph 40 and 41 held as under:

40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd.). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not

perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.* the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur*. The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In *B. Shama Rao v. Union Territory of Pondicherry* it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

DOCTRINE OF BINDING PRECEDENT

Constitution Bench of this Court in the case of Union of India v. Raghubir Singh MANU/SC/0619/1989 : (1989) 2 SCC 754, observed as under:

8. Taking note of the hierarchical character of the judicial system in India, it is of paramount importance that the law declared by this Court should be certain, clear and consistent. It is commonly known that most decisions of the courts are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the dispute between them, but also because in doing so they embody a declaration of law operating as a binding principle in future cases. In this latter aspect lies their particular value in developing the jurisprudence of the law.

9. The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court.

Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangha MANU/SC/0308/2001: (2001) 4 SCC 448, a Constitution Bench of this Court reiterated the same principle and held that: 2. We are of the view that a decision of a Constitution Bench of this Court binds a Bench of two learned

Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, they could have ordered that the matter be heard by a Bench of three learned Judges.

SUPREME COURT DESCRIBED JUSTICE AND TRUTH TO MEAN THE SAME

In Union Carbide Corporation v. Union of India, (1989) 3 SCC 38, the Supreme Court described justice and truth to mean the same. The observations of the Supreme Court are as under: —30. ...when one speaks of justice and truth, these words mean the same thing to all men whose judgment is uncommitted. Of Truth and Justice, Anatole France said :—Truth passes within herself a penetrating force unknown alike to error and falsehood. I say truth and you must understand my meaning. For the beautiful words Truth and Justice need not be defined in order to be understood in their true sense. They bear within them a shining beauty and a heavenly light. I firmly believe in the triumph of truth and justice. That is what upholds me in times of trial....||

In Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271, the Supreme Court observed that the presiding officer of a Court should not simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost and that there is a legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice.

In Chandra Shashi v. Anil Kumar Verma, (1995) 1 SCC 421, the Supreme Court observed that to enable the Courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre-variation and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any Court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in Courts when they would find that truth alone triumphs in Courts.

In Zahira Habibullah Sheikh v. State of Gujarat, (2006) 3 SCC 374, the Supreme Court observed that right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice.

In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370, the Supreme Court again highlighted the significance of truth and observed that the truth should be the guiding star in the entire legal process and it is the duty of the Judge to discover truth to do complete justice. The Supreme Court stressed that Judge has to play an active role to discover the truth and he should explore all avenues open to him in order to discover the truth. The Supreme Court observed as under:—32. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies.....The truth should be the guiding star in the entire

judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. Satyameva Jayate (literally —truth stands invincible) is a mantra from the ancient scripture Mundaka Upanishad. Upon Independence of India, it was adopted as the national motto of India. It is inscribed in Devnagri script at the base of the national emblem. The meaning of the full mantra is as follows: —Truth alone triumphs; not falsehood. Through truth the divine path is spread out by which the sages whose desires have been completely fulfilled, reach where that supreme treasure of truth resides. In the administration of justice, Judges and lawyers play equal roles. Like Judges, lawyers also must ensure that truth triumphs in the administration of justice. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object.

THE TRIAL COURTS WOULD INSIST IMPERATIVELY ON EXAMINING THE PARTY AT THE FIRST HEARING SO THAT BOGUS LITIGATION CAN BE SHOT DOWN AT THE EARLIEST STAGE

In T. Arivandandam v. T.V. Satyapal and Anr. (1977) 4 SCC 467, the Supreme Court held that frivolous and manifestly vexatious litigation should be shot down at the very threshold. Relevant portion of the said judgment is as under.The learned Munsif must remember that if on a meaningful- not formal- reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them.....||

In S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1 the Supreme Court held that a person, who's case is based on falsehood, has no right to approach the Court and he can be thrown out at any stage of the litigation. The Supreme Court held as under: The High Court, in our view, fell into patent error. The

short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that —there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence. The principle of —finality of litigation cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely.

In Ramrameshwari Devi v. Nirmala Devi & Ors. (2011) 8 SCC 249, the Supreme Court considered the use of civil litigation by unscrupulous litigants to the prejudice, harassment and deprivation of the hapless other side and the necessity to put an end to such practice and observed as under:-unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce and valuable

time is consumed or more appropriately, wasted in a large number of uncalled for cases.We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs.

In *Swaran v. State of Punjab*[(2000) 5 SCC 668: 2001 SCC (Cri) 190] this Court was constrained to observe that perjury has become a way of life in our courts.

In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370, the Supreme Court observed that false claims and defences are serious problems. The Supreme Court held as under: - "False claims and false defences. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

In Dalip Singh v. State of U.P., (2010) 2 SCC 114, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:- For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.....In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

Subrata Roy Sahara v. Union of India, (2014) 8 SCC 470, J.S.

Khehar, J. observed that the Indian judicial system is grossly afflicted with frivolous litigation. Relevant portion of the said judgment is as under: "188. The number of similar litigants, as the parties in this group of cases, is on the increase. They derive their strength from abuse of the legal process. Counsel are available, if the litigant is willing to pay their fee. Their percentage is slightly higher at the lower levels of the judicial hierarchy, and almost non-existent at the level of the Supreme Court. One wonders what is it that a Judge should be made of, to deal with such litigants who have nothing to lose. What is the level of merit, grit and composure required to stand up to the pressures of today's litigants? What is it that is needed to bear the affront, scorn and ridicule hurled at officers presiding over courts? Surely one would need superhumans to handle the emerging pressures on the judicial system. The resultant duress is gruelling. One would hope for support for officers presiding over courts from the legal fraternity, as also, from the superior judiciary up to the highest level. Then and only then, will it be possible to maintain equilibrium essential to deal with complicated disputations which arise for determination all the time irrespective of the level and the stature of the court concerned. And also, to deal with such litigants. The Indian judicial system is grossly afflicted, with frivolous litigation. Ways and means need to be evolved, to deter litigants from their compulsive obsession, towards senseless and ill-considered claims. One needs to keep in mind, that in the process of litigation, there is an innocent sufferer on the other side, of every

irresponsible and senseless claim. He suffers long drawn anxious periods of nervousness and restlessness, whilst the litigation is pending, without any fault on his part. He pays for the litigation, from out of his savings (or out of his borrowings), worrying that the other side may trick him into defeat, for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for, what he has lost, for no fault?... This abuse of the judicial process is not limited to any particular class of litigants. The State and its agencies litigate endlessly upto the highest Court, just because of the lack of responsibility, to take decisions. So much so, that we have started to entertain the impression, that all administrative and executive decision making, are being left to Courts, just for that reason. In private litigation as well, the concerned litigant would continue to approach the higher Court, despite the fact that he had lost in every Court hitherto before. The effort is not to discourage a litigant, in whose perception, his cause is fair and legitimate. The effort is only to introduce consequences, if the litigant's perception was incorrect, and if his cause is found to be, not fair and legitimate, he must pay for the same. In the present setting of the adjudicatory process, a litigant, no matter how irresponsible he is, suffers no consequences. Every litigant, therefore likes to take a chance, even when counsel's advice is otherwise.Does the concerned litigant realize, that the litigant on the other side has had to defend himself, from Court to Court, and has had to incur expenses towards such defence?

And there are some litigants who continue to pursue senseless and ill-considered claims, to somehow or the other, defeat the process of law. ...

Adv - Sridhara babu N

CHAPTER
TENANCY AND EVICTION

**EMPLOYER AND EMPLOYEE AND QUARTERS PROVIDED
WHETHER TENANCY EXISTED**

Unichem Laboratories Ltd. vs. Rani Devi and Ors.:
MANU/SC/0435/2017 - The State Government constructed several houses in accordance with the provisions of the Act and allotted quarters to the Appellant/Plaintiff/Public Limited Company so as to enable the Appellant to allot these houses/quarters to the workers for their use and occupation while they were in the Appellant's employment. Respondent No. 1's husband was in the employment of the Appellant as industrial worker. He was working in the Appellant's industrial unit. He applied to the Appellant for allotment of one quarter for

his use and occupation. The Appellant allotted quarter No. 5 to the husband. On allotment, the husband executed a declaration as required under the Act/Rule. The Appellant granted the husband time to vacate the quarter on humanitarian ground. The husband not vacate the quarter after expiry of six months and continued to remain in its occupation. In the meantime, he died leaving behind his wife/Respondent No. 1, who also continued to remain in the occupation of the quarter along with her family members.

The Appellant filed a suit before the Additional District & Sessions Judge against the Respondents for Respondent's eviction from the quarter in question and also for claiming damages for its use and occupation payable. The Trial Court decreed the Appellant's suit and passed eviction decree against the Respondents. The Respondents filed revision before the High Court. By impugned order, the High Court allowed the revision, set aside the decree of the Trial Court and dismissed the Appellant's suit. The High Court held that the civil suit at the instance of the Appellant was not maintainable for want of Appellant's locus; the suit, however, was not barred by Section 13 of the Act; such suit, however, could be filed by the State Government or/and Labour Commissioner; and there was no relationship of landlord and tenant between the Appellant and the original allottee. The High Court directed the Principal Secretary, Labour to take action against the erring officials who failed to take any action to obtain possession of the quarters from illegal occupants. Hence, the present appeal.

Held, while allowing the appeal:

(i) The undisputed facts were sufficient to hold that contractual relationship between the Appellant and the allottee-worker in relation to the quarter for deciding their inter se rights had come into existence. It could be, therefore, construed as tenancy agreement between the parties. The Appellant was, therefore, competent to file the civil suit against the worker for his eviction from the quarter allotted to him on the strength of such agreement by taking recourse to the provisions of the Act. [28]

(ii) The law on this question is well settled. A contract of tenancy created between the employer and employee in relation to any accommodation terminates on the cessation of the employment of an employee. In other words, such tenancy is only for the period of employment and comes to an end on termination of the contract of employment. Such employee then has no right to remain in occupation of the accommodation once he ceases to be in the employment of his employer. He has to then surrender the accommodation to his employer. [30]

(iii) The Respondents too had no independent right to remain in occupation of the quarter in question because they were neither in the employment of the Appellant and nor were the allottees under the Act so as to entitle them to remain in possession on their own rights. The Trial Court was, therefore, justified in recording the findings against the Respondents and was also justified in passing decree for eviction and recovery of rent by way of damages against the Respondents. The impugned order was set aside and that of the Trial Court was restored.

RIGHTS OF A BONA FIDE TENANT WOULD NOT STAND AUTOMATICALLY TERMINATED BY FORFEITURE OF PROPERTY AND VESTING THEREOF IN THE CENTRAL GOVERNMENT

Domnic Alex Fernandes (D) through L.Rs. and Ors. vs. Union of India (UOI) and Ors.: MANU/SC/1016/2017

MESNE PROFITS AND DAMAGES IN EVICTION SUIT

The Supreme Court in **Corporation of Madras Vs. M.K. Buhari (2000) 9 SCC 497** has held that mesne profit cannot be less than the rent payable in respect of the property given on rent. Mesne profits are in the form of damages which are payable by a person in wrongful possession. It protects the interest of the owner/landlord and is payable equivalent to the market rent by the person who has failed to deliver the possession and is holding over the property.

WHEN EVICTION IS SOUGHT ON THE GROUND OF SUB-LETTING

Court in Associated Hotels of India Ltd., Delhi vs. S.B. Sardar Ranjit Singh AIR 1968 SC 933 wherein it was held that when eviction is sought on the ground of sub-letting, the onus to prove sub-letting is on the landlord. If the landlord prima-facie shows that the occupant who was in exclusive possession of the

premises let out for valuable consideration, it would then be for the tenant to rebut the evidence.

Again, in Kala and Anr. vs. Madho Parshad Vaidya, (1998) 6 SCC 573, Court reiterated the very same principle. It was observed that the burden of proof of sub-letting is on the landlord but once he establishes parting of possession by the tenant to third party, the onus would shift on the tenant to explain his possession. If he is unable to discharge that onus, it is permissible for the court to raise an inference that such possession was for monetary consideration.

In Vaishakhi Ram & Ors. vs. Sanjeev Kumar Bhatiani (2008) 14 SCC 356, it was held as under:- It is well settled that the burden of proving sub-letting is on the landlord but if the landlord proves that the sub-tenant is in exclusive possession of the suit premises, then the onus is shifted to the tenant to prove that it was not a case of sub-letting.

INDIAN PERSONS ARE NOT ALLOWED TO TAKE FORCIBLE POSSESSION

Hon'ble Supreme Court in the case of **Krishna Ram Mahale (Dead), by his Lrs. vs. Mrs. Shobha Venkat Rao reported in AIR 1989 SC 2097** wherein it has been held that Indian persons are not allowed to take forcible possession and they are required to obtain such possession as they are entitled to through a Court. The law requires that the true owner should dispossess the trespasser by taking recourse to the remedies under the law.

M/s. Anamallai Club vs. Government of Tamil Nadu and Others reported in AIR 1997 SC 3650, the Hon'ble Supreme Court has held that the compliance of rule of law should be encouraged and should not deprive the person who was in lawful possession removed from possession, accordingly to proper form and to prevent him from going with a high hand and eject such person. Undoubtedly, the true owner is entitled to retain possession even though he had obtained it by force or by other unlawful means but that would not be a ground to permit the owner to take law into his own hands and eject the person in juridical possession or settled possession without recourse of law.

Patil Exhibitors (Pvt) Ltd., vs. The Corporation of the City of Bangalore reported in AIR 1986 KANT 194 (DB) wherein it has been held that no forcible dispossession of person who has juridical possession and landlord can be restrained from resorting to high handed acts aimed at forcible dispossession otherwise than in accordance with law.

Rame Gowda (Dead) By L.Rs. vs. M. Varadappa Naidu (Dead) by L.Rs., and Another reported in MANU/SC/1044/2003 : (2004) 1 SCC 769, the Hon'ble Supreme Court while considering the provisions of Section 6 of the Specific Relief Act, 1963 has held that the occupant in 'settled possession' cannot be dispossessed without due recourse to law. That was a case where

a person, was in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has perfectly good title against all the world but the rightful owner. "8. It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the

last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner."

SUIT TO CHALLENGE DEMOLITION ORDER

In Shiv Kumar Chadha v. Municipal Corporation of Delhi and Others (1993) 3 SCC 161, the Supreme Court held a suit to challenge the demolition to be maintainable if the order is nullity in the eyes of law or the order is outside the Act. There is no such challenge in the present case and therefore, this judgement also does not help the Licensee.

AN EVICTION PETITION AGAINST ONE OF THE JOINT TENANT WAS SUFFICIENT AGAINST ALL THE JOINT TENANTS

Suresh Kumar Kohli vs. Rakesh Jain and Ors.: MANU/SC/0432/2018 - Situation was very clear that when original tenant dies, the legal heirs inherit the tenancy as joint tenants and occupation of one of the tenant was occupation of all the joint tenants. It was not necessary for landlord to implead all legal heirs of the deceased tenant, whether they are occupying the property or not. It was sufficient for the landlord to implead either of those persons who are occupying the property, as party. There might be a case where landlord was not aware of all the legal heirs of deceased tenant and impleading only those heirs

who are in occupation of the property was sufficient for the purpose of filing of eviction petition. An eviction petition against one of the joint tenant was sufficient against all the joint tenants and all joint tenants were bound by the order of the Rent Controller as joint tenancy was one tenancy and was not a tenancy split into different legal heirs.

DECLARATION OF TITLE AND EVICTION

**SOURCE:- Valliamma vs. Dhanpal and Ors.:
MANU/KA/9555/2019**

Brahma Nand Puri -vs- Nelci Puri, since deceased, represented by Mathra Puri and another, reported in **MANU/SC/0295/1964 : AIR 1965 SC 1506**. The said appeal before the Hon'ble Apex Court was with respect to an ejectment suit, wherein in Para-8 of its judgment, the Hon'ble Apex Court observed that, the plaintiffs suit being one for ejectment, he has to succeed or fail on the title he established and if he cannot succeed on the strength of his title, his suit must fail, notwithstanding that the defendant in possession has no title to the property.

Punjab Urban Planning & Development Authority -vs- Shiv Saraswati Iron & Steel Re-Rolling Mills, reported in **[MANU/SC/0234/1998 : (1998) 4 SCC 539]**, wherein in the matter of a suit for specific performance of a contract, the Hon'ble Apex Court was pleased to observe that the plaintiff, instead of proving his own case fully, cannot take advantage of weakness in defendant's case.

Ramchandra Sakharam Mahajan -vs- Damodar Trimbak Tankasale (Dead) and others, reported in **[MANU/SC/7770/2007 : (2007) 6 SCC 737]**, wherein the Hon'ble Apex Court with respect to Sections 5 and 34 of the Specific Relief Act, 1963, in a suit for recovery on the strength of the title, was pleased to observe that, in such kind of suits, the burden of proof is on the plaintiff to establish that title. For appreciating the case of title set up by the plaintiff, the Court was also entitled to consider the rival title set up by the defendants. But, the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree.

Sebastiao Luis Fernandes (Dead) through LR. and others -vs-K.V.P. Sahstri (Dead) through LR. and others,, reported in **[MANU/SC/1257/2013 : (2013) 15 SCC 161]**, wherein the Hon'ble Apex Court with respect to a suit for declaration of title and cancellation of registration of title of defendants, observed that the initial burden of proof to establish ownership is on the plaintiff and the same cannot be placed on defendants.

Union of India and others -vs-Vasavi Co-operative Housing Society Limited and others, reported in **[MANU/SC/0001/2014 : (2014) 2 SCC 269]**, wherein the Hon'ble Apex Court with respect to a suit for declaration of title and possession, was pleased to observe that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff. The legal position, therefore, is clear that the

plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. Even if the title set up by the defendants is found against them, in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited.

CHAPTER LISPENDENCY

DOCTRINE OF LIS PENDENCY IN DISMISSED AND RESTORED SUITS

The decision of this Court in **Vareed Jacob v. Sosamma Geevarghese & Ors. (2004) 6 SCC 378** has been relied upon in which it has been laid down thus : “18. In the case of *Saranatha Ayyangar v. Muthiah Mooppanar* AIR 1934 Mad 49 it has been held that on restoration of the suit dismissed for default all interlocutory matters shall stand restored, unless the order of restoration says to the contrary. That as a matter of general rule on restoration of the suit dismissed for default, all interlocutory orders shall stand revived unless during the interregnum between the dismissal of the suit and restoration, there is any alienation in favour of a third party.

Even the dissenting judgment of S.B. Sinha, J. had on this point noted:

62. It is also of some importance that there exists a view that an order of dismissal of a suit does not render an order of attachment void ab initio as a sale of property under order of attachment would be invalid even after the date of such sale and the order of attachment is withdrawn.

63. A converse case may arise when the property is sold after the suit is dismissed for default and before the same is restored. Is it possible to take a view that upon restoration of suit the sale of property under attachment before judgment becomes invalid? The answer to the said question must be rendered in the negative. By taking recourse to the interpretation of the provisions of the statute, the court cannot say that although such a sale shall be valid but the order of attachment shall revive. Such a conclusion by reason of a judge-made law may be an illogical one.”

DOCTRINE OF LISPENDENCY

T.Ravi & another vs B.Chinna Narasimha and others reported in 2017 (3) Scale 740.

K.N. Aswathnarayana Setty (dead) through LRs. & Ors. v. State of Karnataka & Ors. (2014) 15 SCC 394, MANU/SC/1269/2013 question has been discussed by Court thus : “11. The doctrine of lis pendens is based on legal maxim ut lite pendente nihil innovetur (during a litigation nothing new should be introduced). This doctrine stood embodied in Section

52 of the Transfer of Property Act, 1882. The principle of “lis pendens” is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. However, it must be clear that mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The law simply postulates a condition that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court. The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property pendente lite. (Vide *K. Adivi Naidu v. E. Duruvasulu Naidu* (1995) 6 SCC 150, *Venkatrao Anantdeo Joshi v. Malatibai* (2003) 1 SCC 722, *Raj Kumar v. Sardari Lal* (2004) 2 SCC 601 and *Sanjay Verma v. Manik Roy* (2006) 13 SCC 608.)”

In Thomson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd. (2013) 5 SCC 397, Court has laid down thus : “53. There is, therefore, little room for any doubt that the transfer of the suit property pendente lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is

executed in breach of an injunction issued by a competent court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor.”

In Venkatrao Anantdeo Joshi & Ors. v. Malatibai & Ors. (2003) 1 SCC 722, a question came up for consideration assuming that pending suit for partition, a batai patra was executed on the basis of which tenancy rights were claimed. It was held that such batai patra would not confer any right on the person. It being hit by the principle of lis pendens. This Court has held thus : “8. At the time of hearing of this appeal, learned counsel for the appellants submitted that the plea of tenancy raised by Baburao is on the face of it, bogus so as to defeat the rights of the appellants which are crystallised at the time of passing of the preliminary decree. Presuming that pending the suit for partition, even if batai patra is executed, it would not confer any rights on Baburao as it is hit by principles of lis pendens. In any case, as the preliminary decree becomes final, it was not open for Baburao to raise such contention at the time of passing of final decree for partition.

9. With regard to lis pendens, learned counsel for the appellants rightly referred to the judgment and decree passed in

Regular Civil Suit No. 51 of 1973 and contended that presuming that the so-called batai patra was at all executed by Anantdeo, it was not open to him to execute the same pending disposal of the suit filed by Appellant 1 for partition of the property. In that suit, Appellant 1 and his mother had challenged the transfer of land out of Survey No. 60/A and also for partition of the suit property. By elaborate judgment and order, the suit filed by the appellants was decreed to the extent that they were entitled to 2/3rd share in the suit properties. The court had also directed mesne profits. Till the date of the decree, it was contended by Anantdeo that he was in possession of portion of the suit land and the remaining portion was in possession of Malatibai, in view of the sale deed in her favour. It has also been specifically contended that for some time, property was in possession of Baburao prior to marriage of Shakuntala Bai and then in possession of one Pandurang Saokar and lastly it was in possession of Malatibai and himself. The court specifically arrived at the conclusion that Anantdeo was in possession of the suit property and the so-called transfer was without any legal and family necessity as alleged and, therefore, the appellants were entitled to 2/3rd share in the suit property. In the revenue records also, there is no mutation in favour of Baburao. Further, the so-called compromise decree in Civil Suit No. 288 of 1981 against Anantdeo and Malatibai would not confer any title against the appellant.

10. Further, in a suit for partition where preliminary decree is passed, at the time of passing of the final decree it was not open to the respondent to raise the contention that he was a tenant of the suit premises. Section 97 CPC specifically provides

that where any party aggrieved by the preliminary decree does not appeal from the said decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree.”

In Jayaram Mudaliar v. Ayyaswami & Ors. (1972) 2 SCC 200, it has been laid down thus : “47. It is evident that the doctrine, as stated in Section 52, applies not merely to actual transfers or rights which are subject-matter of litigation but to other dealings with it “by any party to the suit or proceeding, so as to affect the right of any other party thereto”. Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.

48. In the case before us, the Courts had given directions to safeguard such just and equitable claims as the purchaser-

appellant may have obtained without trespassing on the rights of the plaintiff-respondent in the joint property involved in the partition suit before the Court. Hence, the doctrine of lis pendens was correctly applied.”

In Marirudraiah & Ors. v. B. Sarojamma & Ors. (2009) 12 SCC 710, a Constitution Bench Court set aside an order passed by the High Court directing allotment of Item No.9 sold pendente lite to purchaser and compensation to the co-sharers of his predecessor in interest in terms of money based on the market value of the property which was alienated to him. This Court has laid down that courts are not supposed to encourage pendente lite transactions, and regularizing their conduct by showing equity in their favour at the cost of co-sharers.

In Kammana Sambamurthy (Dead) by LRs. v. Kalipatnapu Atchutamma (Dead) & Ors. (2011) 11 SCC 153, Court has laid down that when the vendor was having only $\frac{1}{2}$ share in the property but executed the contract for sale of the entire property, the vendee would be entitled to decree for specific performance only to the extent of $\frac{1}{2}$ share of the vendor and not beyond it.

T.G. Ashok Kumar v. Govindammal & Anr. (2010) 14 SCC 370 in which it has been laid down that in the case of pendente lite transfer of property during the pendency of the partition suit held by the other co-owner, sale pendente lite is not void but subject to the decree in partition suit. The title of the vendee would depend upon the decision in the partition suit in regard to the

title of vendor. If the vendor has title only in respect of a part of the property, vendee's title would be saved only to that extent.

In Gouri Dutt v. Sukur Mohammed MANU/PR/0064/1948 : AIR 1948 PC 147 it was held that broad principle underlying section 52 of Act, is to maintain status quo unaffected by act of any party to the litigation pending its determination and the expression "decree" or "order" includes a decree or order made pursuant to the agreed terms of compromise.

In Krishanaji Pandharinath v. Anusayabai MANU/MH/0141/1959 : AIR 1959 Bom. 475 it was held that even after dismissal suit, the purchaser is subject to lis pendens of an appeal afterwards, if filed. The broad principles underlying section 52 of the Act is to maintain status quo, unaffected by act of any party, to the litigation, pending its determination. The lis continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered.

In Jayaram Mudaliar v. Ayyaswami and others MANU/SC/0507/1972 : AIR 1973 SC 569 the Court said: It is evident that the doctrine, as stated in section 52, applies not merely to actual transfers of rights which are subject-matter of litigation but to other dealings with it by any party to the suit or proceeding, so as to affect the right of any other party thereto. Hence it could be urged that where it is not a party to the litigation but an outside agency such as the tax collecting

authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.

Section 52 of the Act has been construed by a three Judge Bench of Apex Court in **Dev Raj Dogra and others v. Gyan Chand Jain and others MANU/SC/0500/1981 : AIR 1981 SC 981** and it says that for application of said section following conditions have to be satisfied:

1. A suit or a proceeding in which any right to immovable property must be directly and specifically in question, must be pending;
2. The suit or the proceeding shall not be a collusive one;
3. Such property during the pendency of such a suit or proceeding cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be passed therein except under the authority of Court. In other

words, any transfer of such property or any dealing with such property during the pendency of the suit is prohibited except under the authority of Court, if such transfer or otherwise dealing with the property by any party to the suit or proceeding affects the right of any other party to the suit or proceeding under any order or decree which may be passed in the said suit or proceeding.

A Division Bench in Mohammed Ali Abdul Chanimomin v. Bisahemi Kom Abdulla Saheb Momin and another MANU/KA/0096/1973 : AIR 1973 Kant 131 said that object of section 52 of the Act is to subordinate all derivative interests or all interests derived from parties to a suit by way of transfer pendente lite to the rights declared by the decree in the suit and to declare that they shall not be capable of being enforced against the rights acquired by the decree-holder. A transferee in such circumstances therefore takes the consequences of the decree which the party who made the transfer to him would take as the party to the suit. This is founded on the principle of public policy and no question of good faith or bona fides arises. The transferee from one of the parties to the suit cannot assert or claim any title or interest adverse to any of the rights and interests acquired by another party under the decree in suit. The principle of lis pendens prevents anything done by the transferee from operating adversely to the interest declared by the decree.

Court in Thakur Prasad v. Board of Revenue and others 1979 ALJ 1273 said that a transfer lis pendens is not a bad transfer.

It is a transfer subject to result of ultimate decree that might be passed in the case.

In Smt. Sayar Bai v. Smt. Yashoda Bai and others MANU/RH/0029/1983 : AIR 1983 Raj 161 the Court said that during pendency of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and would be bound by the claims which shall ultimately be pronounced. When a suit is filed in respect of immovable property, the jurisdiction, power or control over the property involved in the suit is acquired by the Court, pending the continuance of the action and until the final judgment is pronounced and any transaction or dealing of the property by the parties to the suit or proceedings would not affect the decree or order which may be passed by the Court.

In Ramjidas v. Laxmi Kumar and others MANU/MP/0022/1987 : AIR 1987 MP 78 (GB) following several authorities of different Courts including the Apex Court's decision in Jayaram Mudaliar (supra) the Court observed that the purpose of section 52 is not to defeat any just and equitable claim but only to subject them to the authority of Court which is dealing with the property to which the claims are put forward.

In Lov Raj Kumar v. Dr. Major Daya Shanker and others MANU/DE/0616/1985 : AIR 1986 Delhi 364 it was held: 31. The principles contained in section 52 of Transfer of Property Act

are in accordance with the principle of equity, good conscience or justice, because they rest upon an equitable and just foundation, that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. Allowing alienations made during pendency of a suit or an action to defeat rights of a plaintiff will be paying premium to cleverness of a defendant and thus defeat the ends of justice and throw away all principles of equity.

In Narendrabhai Chhaganbhai Bharatia v. Gandevi Peoples Co-op. Bank Ltd. and others MANU/GJ/0126/2002 : AIR 2002 Guj 209 the Court said: 20. The principle underlying the object of the aforesaid provision is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The principles contained in this section are in accordance with the principle of equity, good conscience or justice because they rest upon an equitable and just foundation, that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. Allowing alienations made during pendency of a suit or an action to defeat rights of a plaintiff bank will be paying premium to cleverness of a defendant and thus defeat the ends of justice and throw away all principles of equity.

In Hardev Singh v. Gurmail Singh (Dead) by L.Rs MANU/SC/0719/2007 : the Court said that section 52 of the Act merely prohibits transfer. It does not say that the same would result in an illegality. The only declaration by application of

section 52 is that the purchaser during pendency of suit would be bound by result of litigation. The transaction, therefore, from its inception was not void or of no effect but would abide by the decision in pending suit. The real question up for consideration therein was in regard to Sections 41 and 43 of Act, 1882. The Court clarified doctrine of feeding the estoppel embodied in section 43 which envisages that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires the benefit of a subsequent acquisition goes automatically to the earlier grantee or as it is usually expressed, feeds the estoppel. The principle is based on equitable doctrine that a person who promise to perform more than he can perform must make good his contract when he acquires power of performance. The Court also clarified that transfer where is invalid the above doctrine will have no application.

Jagan Singh v. Dhanwanti MANU/SC/0046/2012 : 2012 (2) SCC 628 has favoured to apply principle of lis pendens irrespective of the fact, whether there was any stay order passed by Court or not. The Court said: If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable

by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force. In the present case, it would be canvassed on behalf of the respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in Krishanaji Pandharinath (*supra*) to cover the present situation under the principle of *lis pendens* since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of *lis pendens* is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered under section 52 of the T.P. Act.

Privy Council in the case of **Gouri Dutt Maharaj v. Sukur Mohammed and others MANU/PR/0175/1948 : AIR (35) 1948 (Sic)**, observed as under: The broad purpose of section 52 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in bona fide proceedings. To apply any such test is to misconceive the object of the enactment and in the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the agreement of 8.6.1932, had not been registered.

DOCTRINE OF LISPENDENCY APPLIES TO PARTIES OUTSIDE THE LITIGATION

Jayaram Mudaliar v. Ayyaswami & Ors. (1972) 2 SCC 200 :

“47. It is evident that the doctrine, as stated in Section 52, applies not merely to actual transfers or rights which are subject-matter of litigation but to other dealings with it “by any party to the suit or proceeding, so as to affect the right of any other party thereto”. Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52.

Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.”

Vinodan v. Vishwanathan (2009) 4 SCC 66 thus : “11. In the facts and circumstances of the case, while balancing the equities and for keeping peace and happiness in the family, we think it would be just and proper to direct the appellant to pay Rs 5,50,000 to the respondent within a period of four months. On receiving the said amount, the respondent may construct a suitable house in his portion of the land and for that purpose we grant one year’s time from the date of payment of Rs 5,50,000 to the respondent to vacate the portion of the building which is presently in his possession and give vacant and peaceful possession of his portion of the building to the appellant in lieu of payment of Rs 5,50,000. We are granting a long time to the respondent to vacate the portion of the building in his possession to avoid any inconvenience to the respondent.”

LISPENDENCY AND ADVERSE POSSESSION

In Karnataka Board of Wakf v. Government of India & Ors. (2004) 10 SCC 779 it was held that when litigation was pending

it could not be said that the possession was peaceful or hostile in any view of the matter. It was held thus : “11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M. Karim v. Bibi Sakina AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D.N. Venkatarayappa v. State of Karnataka (1997) 7 SCC 567.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party,

(d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

AN EFFORT BE MADE TO SETTLE DISPUTES BY MEDIATION AS CHERISHED BY MAHATHMA GANDHI SAYS JUSTICE MARKANDEY KATJU and JUSTICE GYAN SUDHA MISRA

IN THE SUPREME COURT OF INDIA IN CASE OF B.S.Krishna Murthy & Anr. vs B.S.Nagaraj & Ors. **2011 AIR 794 = 2011 SCR 387**, a case between brothers, Supreme court JUSTICE MARKANDEY KATJU and JUSTICE GYAN SUDHA MISRA counseled litigant brothers to go in for mediation with the following notable quotes in order:- This is a dispute between brothers. In our opinion, an effort should be made to resolve the dispute between the parties by mediation. In our opinion, the lawyers should advise their clients to try for mediation for resolving the disputes, especially where relationships, like family relationships, business relationships, are involved, otherwise, the litigation drags on for years and decades often ruining both the parties.

Hence, the lawyers as well as litigants should follow Mahatma Gandhi's advice in the matter and try for arbitration/mediation. This is also the purpose of Section 89 of the Code of Civil Procedure.

In this connection, we would like to quote the following passages from Mahatma Gandhi's book 'My Experiments with Truth' :- "I saw that the facts of Dada Abdulla's case made it a very strong indeed, and that the law was bound to be on his side. But I also saw that the litigation, if it were persisted in, would ruin the plaintiff and the defendant, who were relatives and both belonged to the same city. No one knew how long the case might go on. Should it be allowed to continue to be fought out in court, it might go on indefinitely and to no advantage of either party. Both, therefore, desired an immediate termination of the case, if possible. I approached Tyeb Sheth and requested and advised him to go to arbitration. I recommended him to see his counsel. I suggested to him that if an arbitrator commanding the confidence of both parties could be appointed, the case would be quickly finished. The lawyers' fees were so rapidly mounting up that they were enough to devour all the resources of the clients, big merchants as they were. The case occupied so much of their attention that they had no time left for any other work. In the meantime mutual ill-will was steadily increasing. I became disgusted with the profession. As lawyers the counsel on both sides were bound to rake up points of law in support of their own clients. I also saw for the first time that the winning party never recovers all the costs incurred. Under the Court Fees Regulation there was a fixed scale of costs to be allowed as between party and party, the actual costs as between attorney and client being very much higher. This was more than I could bear. I felt that my duty was to befriend both parties and bring them together. I strained every nerve to bring about a compromise. At last Tyeb

Sheth agreed. An arbitrator was appointed, the case was argued before him, and Dada Abdulla won. But that did not satisfy me. If my client were to seek immediate execution of the award, it would be impossible for Tyeb Sheth to meet the whole of the awarded amount, and there was an unwritten law among the Porbandar Memons living in South Africa that death should be preferred to bankruptcy. It was impossible for Tyeb Sheth to pay down the whole sum of about # 37,000 and costs. He meant to pay not a pie less than the amount, and he did not want to be declared bankrupt. There was only one way. Dada Abdulla should allow him to pay in moderate installments. He was equal to the occasion, and granted Tyeb Sheth installments spread over a very long period. It was more difficult for me to secure the concession of payment by instalments than to get the parties to agree to arbitration. But both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the the practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby-not even money, certainly not my soul."

Adv - Sridhara babu N

CHAPTER
JUDGEMENT - EXECUTION - DECREE - FDP - COMPROMISE

DEATH OF DECREE HOLDER AND EXECUTION PROCEEDINGS

Apex Court's judgment in the case of V.UHIRAPATHI vs. ASHRABALI & OTHERS reported in AIR 1998 SC 1168. The said paragraph is extracted herein below: "15. It is clear, therefore, that if after the filing of an execution petition in time, the decree holder dies and his legal representatives do not come on record or the judgment debtor dies and his legal representatives are not brought on record, then there is no abatement of the execution petition. If there is no abatement, the position in the eye of law is that the execution petition remains pending on the file of the Execution Court. If it remains pending and if no time limit is prescribed to bring the legal representatives on record in execution proceedings, it is open in case of death of the decree holder, for his legal representative to come on record at any time. The execution application cannot even be dismissed for default behind the back of the decree holder's legal representatives. In case of death of the judgment debtor, the decree holder could file an application to bring the legal representatives of the judgment debtor on record, at any time. Of course, in case of death of judgment-debtor, the Court can fix a reasonable time for the said purpose and if the decree holder does not file an application for the aforesaid purpose, the Court can dismiss the execution petition for default. But in any event the execution petition cannot be dismissed as abated. Alternatively, it is also open to the decree holder's legal representatives, to file a fresh execution petition in case of death

of the decree holder; or, in case of death of the judgment debtor, the decree holder can file a fresh execution petition impleading the legal representatives of the judgment debtor; such a fresh execution petition, if filed, is, in law, only a continuation of the pending execution petition - the one which was filed in time by the decree holder initially. This is the position under the Code of Civil Procedure."

TRANSFeree CAN MOVE FOR EXECUTION OF DECREE

Apex Court's judgment in the case of DHANI RAM GUPTA AND OTHERS vs. LALA SRI RAM AND ANOTHER reported in 1980 (2) SCC 162, wherein it is held that once the decree holder transfers his interest in the decree, the transferee can move for the execution of the decree.

FDP PROCEEDINGS

Khemchand Shankar Chaudhari & Anr. v. Vishnu Hari Patil & Ors. (1983) 1 SCC 18 in which this Court has laid down thus :
 "6. Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject-matter of a suit from any of the parties to the suit will be bound insofar as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure

clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an Official Receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an Official Receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the court to be impleaded as parties they cannot be turned out. The Collector who has to effect partition of an estate under Section 54 of the Code of Civil Procedure has no doubt to divide it in accordance with the decree sent to him. But if a party to such a decree dies leaving some heirs about whose interest there is no dispute should he fold up his hands and return the papers to the civil court? He need not do so. He may proceed to allot the share of the deceased party to his heirs. Similarly he may, when there is no dispute, allot the share of a deceased party in favour of his legatees. In the case of insolvency of a party, the Official Receiver may be allotted the share of the insolvent. In the case of

transferees pendente lite also, if there is no dispute, the Collector may proceed to make allotment of properties in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no locus standi. A transferee from a party of a property which is the subject-matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also do so. Such a construction of Section 54 of the Code of Civil Procedure advances the cause of justice. Otherwise in every case where a party dies, or where a party is adjudicated as an insolvent or where he transfers some interest in the suit property pendente lite the matter has got to be referred back to the civil court even though there may be no dispute about the succession, devolution or transfer of interest. In any such case where there is no dispute if the Collector makes an equitable partition taking into consideration the interests of all concerned including those on whom any interest in the subject-matter has devolved, he would neither be violating the decree nor transgressing any law. His action would not be ultra vires. On the other hand, it would be in conformity with the intention of the legislature which has placed the work of partition of lands subject to payment of assessment to the Government in his hands to be carried out "in accordance with the law (if any) for the time being in force relating to the partition or the separate possession of shares." There is no dispute on the aforesaid principle.

PRELIMINARY DECREE CANNOT BE AGITATED IN FINAL DECREE PROCEEDINGS:-

Whether preliminary decree can be reopened, has been considered by Court in T. Ravi V. B Chinna Narasimha [2017(3) SCALE 740], in which reliance has been placed on Venkata Reddy & Ors. v. Pethi Reddy [AIR 1963 SC 992] and in view of section 97 of CPC it has been laid down that once the matter has been considered in preliminary decree, it cannot be reagitated in the appeal against the final decree. Preliminary decree is final with respect to the shares. “37. In the instant case preliminary decree was passed in the year 1970 and the shares were declared to the aforesaid extent of the respective parties therein who were the heirs of Late Nawab Jung. Hamid Ali Khan, defendant No.1, had only 14/104th share in the disputed property. Preliminary decree dated 24.11.1970 has attained finality which was questioned in appeal on limited extent in the High Court which has attained finality by dismissal of LPA on 12.10.1977. Thus the determination of shares as per preliminary decree has attained finality, shares of the parties had been crystalised in each and every property. Purchaser pendente lite is bound by the preliminary decree with respect to the shares so determined and it cannot be re-opened and whatever equity could have been claimed in the final decree proceedings to the extent of vendor's share has already been extended to the purchasers.”

In Venkata Reddy & Ors. v. Pethi Reddy AIR 1963 SC 992, it has been laid down that the preliminary decree for partition is final. It also embodies the final decision of the Court.

In the case of Phoolchand and Anr. vs. Gopal Lal, AIR 1967 SC 1470, Court has laid down that there can be variation in shares in the preliminary decree. Variation itself is a Decree. In a case for partition, if any event transpires after preliminary decree, which necessitates the change in shares, same can be considered. “6. The next contention is that there cannot be two preliminary decrees and therefore when the trial court varied the shares as indicated in the preliminary decree of August 1, 1942 there was no fresh preliminary decree passed by the trial court. It is not disputed that in a partition suit the court has jurisdiction to amend the shares suitably even if the preliminary decree has been passed if some member of the family to whom an allotment was made in the preliminary decree dies thereafter : (Parshuram v. Hirabai "AIR 1957 Bom 59'). So the trial court was justified in amending the shares on the deaths of Sohan Lal and Smt. Gulab Bai. The only question then is whether this amendment amounted to a fresh decree. The Allahabad High Court in Bharat Indo v. Yakub Hassan (1913 ILR 35 All 159) the Oudh Chief Court in Kedemath v. Pattu Lal (ILR 20 Luck 557 (AIR 1945 Oudh 312), and the Punjab High Court in Joti Parshad v. Ganeshi Lal (AIR 1961 Punj 120) seem to take the view that there can be only one preliminary decree and one final decree thereafter. The Madras, Bombay and Calcutta High Courts seem to take the view that there can be more than one preliminary

decree : (Kasi v. V. Ramanathan Chettiar(1947-2 Mad LJ 523) Raja Peary Mohan v. Manohar (27 Cal WN 989 (AIR 1924 Cal 160), and Parshuram v. Hirabai. AIR 1957 Bom 59.

Court in SS Reddy vs. Narayan Reddy, (1991) 3 SCC 647, in which there was change of law after passing of the preliminary decree. In that context, this Court has laid down that since Hindu daughter's rights in coparcenary property were not recognized earlier, it should be taken on the basis of the law which prevails on the date of final decree proceedings. In the meanwhile, after passing of preliminary decree the amendment that has been taken place by way of Amending Act was taken into consideration and the final decree was modified, accordingly. It was also a case of subsequent event after passing of the preliminary decree which necessitated re-determination of the shares, otherwise preliminary decree was final.

Court in S. Satnam Singh and Ors vs. Surender Kaur and Anr. [(2009) 2 SCC 562] in which Court laid down thus: “18. In certain situations, for the purpose of complete adjudication of the disputes between the parties an appellate Court may also take into consideration subsequent events after passing of the preliminary decree.

CONSENT DECREE AND COMPROMISE

Sneh Gupta v. Devi Sarup and others [(2009) 6 SCC 194] The court has also a duty to prevent injustice to one of the parties to the litigation. It cannot exercise its jurisdiction to allow the proceedings to be used to work as substantial injustice.

A consent decree, as is well-known, is merely an agreement between the parties with the seal of the court superadded to it. {See Baldevdas Shivilal and Another v. Filmistan Distributors (India) P. Ltd. and Others [(1969) 2 SCC 201], Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari and Ors. [JT 2007 (12) SC 352]}.

If a compromise is to be held to be binding, as is well known, must be signed either by the parties or by their counsel or both, failing which Order XXIII, Rule 3 of the code of Civil Procedure would not be applicable. {See Gurpreet Singh v. Chatur Bhuj Goel [(1988) 1 SCC 270]} In Dwarka Prasad Agarwal (D) By LRS. and Another v. B.D. Agarwal and Others [(2003) 6 SCC 230], this Court held:

"32. The High Court also failed and/or neglected to take into consideration the fact that the compromise having been entered into by and between the three out of four partners could not have been termed as settlement of all disputes and in that view of the matter no compromise could have been recorded by it. The effect of the order dated 29-6-1992 recording the settlement was brought to the notice of the High Court, still it failed to rectify the mistake committed by it. The effect of the said order was grave. It was found to be enforceable. It was construed to be an order of

the High Court, required to be implemented by the courts and the statutory authorities.

35...Even if the provisions of Order 23 Rule 3 of the Code of Civil Procedure and/or principles analogous thereto are held to be applicable in a writ proceeding, the Court cannot be permitted to record a purported compromise in a casual manner. It was suo motu required to address itself to the issue as to whether the compromise was a lawful one and, thus, had any jurisdiction to entertain the same..." {See also K. Venkatachala Bhat and Another v. Krishna Nayak (d) by LRs. and Others [(2005) 4 SCC 117]}.

In R. Rathinavel Chettiar and Another v. V. Sivaraman and Others [(1999) 4 SCC 89], Court opined : "22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained."

SUIT TO SET ASIDE COMPROMISE DECREE

Sneh Gupta v. Devi Sarup and others [(2009) 6 SCC 194] If the compromise has been accepted in absence of all the parties,

the same would be void. But if the same having resulted in grant of a decree, the decree based on compromise was required to be set aside. The compromise may be void or voidable but it is required to be set aside by filing a suit within the period of limitation. {[See Mohd. Noorul Hoda v. Bibi Raifunnisa & Ors. [(1996) 7 SCC 767]}. Limitation is a statute of repose. If a suit is not filed within the period of limitation, the remedy would be barred.

WHETHER PRELIMINARY DECREE BE REOPENED

Court in T. Ravi V. B Chinna Narasimha [2017(3) SCALE 740], in which reliance has been placed on Venkata Reddy & Ors. v. Pethi Reddy {AIR 1963 SC 992} and in view of section 97 of CPC it has been laid down that once the matter has been considered in preliminary decree, it cannot be reagitated in the appeal against the final decree. Preliminary decree is final with respect to the shares. “37. In the instant case preliminary decree was passed in the year 1970 and the shares were declared to the aforesaid extent of the respective parties therein who were the heirs of Late Nawab Jung. Hamid Ali Khan, defendant No.1, had only 14/104th share in the disputed property. Preliminary decree dated 24.11.1970 has attained finality which was questioned in appeal on limited extent in the High Court which has attained finality by dismissal of LPA on 12.10.1977. Thus the determination of shares as per preliminary decree has attained finality, shares of the parties had been crystalised in each and every property. Purchaser pendente lite is bound by the

preliminary decree with respect to the shares so determined and it cannot be re-opened and whatever equity could have been claimed in the final decree proceedings to the extent of vendor's share has already been extended to the purchasers.'

In Venkata Reddy & Ors. v. Pethi Reddy AIR 1963 SC 992, it has been laid down that the preliminary decree for partition is final. It also embodies the final decision of the Court. The question of finality has been discussed thus : "6. The new provision makes it clear that the law is and has always been that upon the father's insolvency his disposing power over the interest of his undivided sons in the joint family property vests in the Official Receiver and that consequently the latter has a right to sell that interest. The provision is thus declaratory of the law and was intended to apply to all cases except those covered by the two provisos. We are concerned here only with the first proviso.

In the case of Phoolchand and Anr. vs. Gopal Lal, AIR 1967 SC 1470, Court has laid down that there can be variation in shares in the preliminary decree. Variation itself is a Decree. In a case for partition, if any event transpires after preliminary decree, which necessitates the change in shares, same can be considered. "6. The next contention is that there cannot be two preliminary decrees and therefore when the trial court varied the shares as indicated in the preliminary decree of August 1, 1942 there was no fresh preliminary decree passed by the trial court. It is not disputed that in a partition suit the court has jurisdiction

to amend the shares suitably even if the preliminary decree has been passed if some member of the family to whom an allotment was made in the preliminary decree dies thereafter : (Parshuram v. Hirabai "AIR 1957 Bom 59'). So the trial court was justified in amending the shares on the deaths of Sohan Lal and Smt. Gulab Bai. The only question then is whether this amendment amounted to a fresh decree. The Allahabad High Court in Bharat Indo v. Yakub Hassan (1913 ILR 35 All 159) the Oudh Chief Court in Kedemath v. Pattu Lal (ILR 20 Luck 557 (AIR 1945 Oudh 312), and the Punjab High Court in Joti Parshad v. Ganeshi Lal (AIR 1961 Punj 120) seem to take the view that there can be only one preliminary decree and one final decree thereafter. The Madras, Bombay and Calcutta High Courts seem to take the view that there can be more than one preliminary decree : (Kasi v. V. Ramanathan Chettiar(1947-2 Mad LJ 523) Raja Peary Mohan v. Manohar (27 Cal WN 989 (AIR 1924 Cal 160), and Parshuram v. Hirabai. AIR 1957 Bom 59.

Sardar Surjeet Singh vs Juguna Bai (Since Dead) . on 2 August, 2017 We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be

convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed. There is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. In any case if two views are possible-and obviously this is so because the High Courts have differed on the question-we would prefer the view taken by the High Courts which hold that a second preliminary decree can be passed, particularly in partition suits

where parties have died after the preliminary decree and shares specified in the preliminary decree have to be adjusted. We see no reason why in such a case if there is dispute, it should not be decided by the court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. Whether there can be more than one final decree does not arise in the present appeal and on that we express no opinion. We therefore hold that in the circumstances of this case it was open to the court to draw up a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed. Further as there was dispute between the surviving parties as to devolution of the shares of the parties who were dead and that dispute was decided by the trial court in the present case and thereafter the preliminary decree already passed was amended, the decision amounted to a decree and was liable to appeal. We therefore agree with the view taken by the High Court that in such circumstances a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree. We should however like to make it clear that this can only be done so long as the final decree has not been passed. We therefore reject this contention of the appellant. **The decision is distinguishable and cannot be said to be applicable in view of the factual matrix**

of the instant case where the right has been asserted, which came into existence before the preliminary decree was passed and Nima Kaur was not a party to suit. It also appears that it was not the plea that was taken by any of the parties during the course of preliminary decree that she was having right, title or interest on the basis of settlement/gift deed dated 30.12.1978.

Court in SS Reddy vs. Narayan Reddy, (1991) 3 SCC 647, in which there was change of law after passing of the preliminary decree. In that context, this Court has laid down that since Hindu daughter's rights in coparcenary property were not recognized earlier, it should be taken on the basis of the law which prevails on the date of final decree proceedings.

Court in S. Satnam Singh and Ors vs. Surender Kaur and Anr. [(2009) 2 SCC 562] in which Court laid down thus: "18. In certain situations, for the purpose of complete adjudication of the disputes between the parties an appellate Court may also take into consideration subsequent events after passing of the preliminary decree.

JUDGMENT AND DECREE AND REASONS

In Balraj Taneja v. Sunil Madan, AIR 1999 SC 3381, the Supreme Court has held that a Judge cannot merely say "Suit decreed" or "Suit dismissed". The Supreme Court in *Swaran Lata Ghosh v. H.K. Banerjee*, (1969) 1 SCC 709, indicated that

adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. The relevant observation reads thus:- "6. Trial of a civil dispute in court is intended to achieve, according to law and the procedure of the court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial, the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest: it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the court has decided

against him, and more so, when the judgment is subject to appeal. The appellate court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just."

In Lakshmi Ram Bhuyan v. Hari Prasad Bhuyan, (2003) 1 SCC 197, the Supreme Court observed that Order XX of the Code of Civil Procedure requires a judgment to contain all the issues and findings or decisions there on with the reasons therefor. The relevant paragraph reads thus: "10.Order XX requires a judgment to contain all the issues and findings or decision thereon with the reasons therefor. The judgment has to state the relief allowed to a party. The preparation of decree follows the judgment. The decree shall agree with the judgment. The decree shall contain, inter alia, particulars of the claim and shall specify clearly the relief granted or other determination of the suit. The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid. Rules 9 to 19 of Order XX are illustrative of contents of decrees in certain specified categories of suits. The very obligation cast by the Code that the decree shall agree with the judgment spells out an obligation on the part of the author of the judgment to clearly indicate the relief or reliefs to which a party, in his opinion, has been found entitled to enable decree being framed in such a manner that it agrees with the judgment and specifies clearly the relief granted or other determination of the suit. The operative part of the judgment

should be so clear and precise that in the event of an objection being laid, it should not be difficult to find out by a bare reading of the judgment and decree whether the latter agrees with the former and is in conformity therewith. A self-contained decree drawn up in conformity with the judgment would exclude objections and complexities arising at the stage of execution."

The Supreme Court in State of Punjab v. Bhag Singh,(2004) 1 SCC 547, at page 549 indicated the necessity to show reasons in support of the judgment. The observation reads thus : "6. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the inscrutable face of the sphinx, it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The inscrutable face of a sphinx is ordinarily incongruous with a judicial or quasi-judicial performance."

In M/s. Meditronics Corporation of India & Ors. v. Dr. Mrs. Salima A. Rais (AIR 2007 (NOC) 735)(Bom.), Division Bench of the Bombay High Court observed that irrespective of the fact that the defendant has not filed written statement or he remained ex parte, the Court has to write a judgment which must be in conformity with the provisions of the Code of Civil Procedure.

In State of T.N. v. S. Thangavel, (1997) 2 SCC 349, the Supreme Court observed that the judgment denotes the reasons which the Court gives for its decision. The observation reads thus: "6.A judgment means a statement given by a Judge of the grounds of a decree or order. Section 2(8) defines Judge to mean the presiding officer of a civil court. An officer, therefore, is appointed to preside and to administer the law in a court of justice and clothed with judicial authority. Judgment is the decision of a court of justice upon the respective rights and claims of the parties to an action in a suit submitted to it for determination. The word judgment denotes the reasons which the court gives for its decision."

The Supreme Court in Ramesh Chand Ardawatiya v. Anil Panjwani, AIR 2003 SC 2508, while considering the provisions of Order IX Rule 6 and Order VIII Rule 10 of the Code of Civil Procedure, observed that even if the suit proceeds ex parte under Order IX Rule 6, the necessity of proof by the plaintiff of its case cannot be dispensed with. Their Lordships observed as under:- "33....But there is substance in the other limb of this submission made by the learned senior counsel for the defendant-appellant.

Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order VIII Rule 10 of the CPC is attracted and the Court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the Court is not bound to frame issues under Order XIV and deliver the judgment on every issue as required by Order XX Rule 5. Yet the trial Court would scrutinise the available pleadings and documents, consider the evidence adduced, and would do well to frame the 'point for determination' and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence."

In the case of Sushil Kumar Sabharwal v. Gurpreet Singh and others, AIR 2002 SC 2370, the Supreme Court held as under:- "12. The provision contained in Order 9 Rule 6 CPC is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the court depending on the given situation. The three situations are: (i) when summons duly served, (ii) when summons not duly served, and (iii) when

summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the court may make an order that the suit be heard ex parte. The provision casts an obligation on the court and simultaneously invokes a call to the conscience of the court to feel satisfied in the sense of being "proved" that the summons was duly served when and when alone, the court is conferred with a discretion to make an order that the suit be heard ex parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the court to satisfy itself on the service of summons. Any default or casual approach on the part of the court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for not fault of his. If only the trial court would have been conscious of its obligation cast on it by Order 9 Rule 6 CPC, the case would not have proceeded ex parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation."

Similar view has been taken by the Allahabad High Court in the case of Commissioner of Income Tax v. Surendra Singh Pahwa and others, AIR 1995 All. 259, wherein the Court held as under:- "5. Having heard the learned counsel for the parties and having perused the judgment dated 5.1.1994, I am of the view that it cannot be sustained. Even an ex parte judgment

should satisfy the description of 'judgment' as laid down in Order 20, Rule 4(2), C.P.C., which visualises that the judgment of a Court other than the Court of Small Causes "shall contain concise statement of the case, points for determination, decision and the reasons for such decision." A 'judgment' for its sustenance must contain not only findings on the points, but must also contain what evidence consists of, and how does not prove plaintiffs case. A judgment unsupported by reasons is no judgment in the eye of law. It is well settled that reasons are the links between the material on record and the conclusion arrived at by the Court. Mere fact that the defendant absented himself on the date of hearing and the suit proceeded ex parte, did not by itself entitle the plaintiff to get a decree in his favour. The Court was under an obligation to apply its mind to whatever ex parte evidence or affidavit filed under Order 19 of the Code is on the record of the case, and application of mind must be writ large on the face of record. This is possible only if the Court directs itself to whatever material is on record of the case, analyses the same and then comes to any conclusion on the basis of evidentiary value of the ex parte evidence or affidavit brought on record by the plaintiff....."

PURCHASERS CAN WORK OUT THE EQUITY IN THE FINAL DECREE PROCEEDINGS BUT IT IS ONLY TO THE LEGALLY PERMISSIBLE EXTENT AND NOT BEYOND THAT

Court in K. Adivi Naidu & Ors. v. E. Duruvasulu Naidu & Ors. (1995) 6 SCC 150, has laid down that when a specific property

comprising of undivided share in joint family properties is purchased by appellants from alienee of Karta of the joint family prior to partition suit and where the preliminary decree in partition suit directed that properties be divided by metes and bounds, taking the good and bad qualities thereof, then the preliminary decree was allowed to become final. This Court held that the trial court should give effect to the preliminary decree, and though the appellants had no equities, the restrictive share to which the principal alienator was entitled, should be allotted to them as a special case. In the instant case, preliminary decree has declared the share only to the extent of 14/104th in the disputed property in item No.6, schedule 'B'. Thus, by no equitable principle the purchaser can claim the entire property to be allotted to him.

Decision in Dhanlakshmi & Ors. v. P. Mohan & Ors., (2007)

10 SCC 719 has been referred laying down that: "5. Section 52 deals with a transfer of property pending suit. In the instant case, the appellants have admittedly purchased the undivided shares of Respondents 2, 3, 4 and 6. It is not in dispute that the first respondent P. Mohan has got an undivided share in the said suit property. Because of the purchase by the appellants of the undivided share in the suit property, the rights of the first respondent herein in the suit or proceeding will not affect his right in the suit property by enforcing a partition. Admittedly, the appellants, having purchased the property from the other co-sharers, in our opinion, are entitled to come on record in order to

work out the equity in their favour in the final decree proceedings. In our opinion, the appellants are necessary and proper parties to the suit, which is now pending before the trial court. We also make it clear that we are not concerned with the other suit filed by the mortgagee in these proceedings.”

WITHDRAWAL OF SUIT

It is also well known that a suit cannot be withdrawn by a party after he acquires a privilege. **In R. Ramamurthy Ayer v. Raja V. Rajeswara Rao [(1972) 2 SCC 721]**

R. Rathinavel Chettiar v. V. Sivaraman [(1999) 4 SCC 89], Court, stated the law, thus : "22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained."

A right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party. [See Bijayananda

Patnaik v. Satrughna Sahu and Ors. [(1964) 2 SCR 538] and Hulas Rai Baij Nath v. Firm K.B. Bass & Co. [(1967) 3 SCR 886].

FRAUD ON COURT - COURTS HAVE BEEN HELD TO HAVE INHERENT POWER TO SET ASIDE AN ORDER OBTAINED BY FRAUD PRACTICED UPON THAT COURT

In Indian Bank v. Satyam Fibres (India) Pvt. Ltd., 1996 (5) S.C.C. 550 another two Judges Bench, after making reference to a number of earlier decisions rendered by different High Courts in India, stated the legal position thus: "Since fraud affects the solemnity regularity and orderliness of the proceedings of the Court and also amounts to abuse of the process of Court, the Courts have been held to have inherent power to set aside an order obtained by fraud practiced upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order."

EXECUTING COURT CANNOT ENTERTAIN ANY OBJECTION THAT THE DECREE WAS INCORRECT IN LAW OR ON FACTS. UNTIL IT IS SET ASIDE BY AN APPROPRIATE PROCEEDING IN APPEAL OR REVISION

Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and others AIR 1970 S.C.1475, the Court was considering scope of objection under Section 47 of the Code in relation to the executability of a decree and it was laid down that only such a

decree can be subject matter of objection which is nullity and not a decree which is erroneous either in law or on facts. J.C.Shah, J. speaking for himself and on behalf of K.S.Hegde and A.N.Grover, JJ., laid down the law at pages 1476-77 which runs thus:- A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

IF A SUIT PROSECUTED WITHOUT SUCH LEAVE CULMINATES IN A DECREE - SUCH DECREE IS VOIDABLE BUT NOT VOID

In the case of **Everest Coal Company (P) Ltd. v. State of Bihar and others, (1978) 1 SCC 12**, Court held that leave for suing the receiver can be granted even after filing of the suit and held that the infirmity of not obtaining the leave does not bear upon the jurisdiction of the trial court or the cause of action but it is peripheral. It also held that if a suit prosecuted without such leave culminates in a decree, the same is liable to be set aside. These observations do not mean that the decree is nullity. On the other hand, the observation of the Court at page 15 that any litigative disturbance of the Courts possession without its permission amounts to contempt of its authority; and the wages of contempt of Court in this jurisdiction may well be voidability of

the whole proceeding would lend support to the view and such decree is voidable but not void.

EXECUTING COURT CAN REFUSE TO EXECUTE THE DECREE HOLDING THAT IT HAS BECOME INEXECUTABLE ON ACCOUNT OF THE CHANGE IN LAW

In the case of **Haji Sk.Subhan v. Madhorao, AIR 1962 S.C.1230**, the question which fell for consideration of this Court was as to whether an executing Court can refuse to execute a decree on the ground that the same has become inexecutable on account of the change in law in Madhya Pradesh by promulgation of M.P.Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 and a decree was passed in ignorance of the same. While answering the question in the affirmative, the Court observed at page 1287 thus:- The contention that the Executing Court cannot question the decree and has to execute it as it stands, is correct, but this principle has no operation in the facts of the present case. The objection of the appellant is not with respect to the invalidity of the decree or with respect to the decree being wrong. His objection is based on the effect of the provisions of the Act which has deprived the respondent of his proprietary rights, including the right to recover possession over the land in suit and under whose provisions the respondent has obtained the right to remain in possession of it. In these circumstances, we are of opinion that the executing Court can refuse to execute the decree holding that it has become inexecutable on account of the change in law and its effect.

In the case of **Vidya Sagar v. Smt. Sudesh Kumari and others**, **AIR 1975 S.C.2295**, an objection was taken under Section 47 of the Code to the effect that decree passed was incapable of execution after passing of U.P.Zamindari Abolition and Land Reforms Act, 1950 and the objection was allowed by the High Court and when the matter was brought to this Court, the order was upheld holding that decree was incapable of execution by subsequent promulgation of legislation by State Legislature.

REASON IS THE SOUL OF LAW - MAXIM 'CESSANTE RATIONES LEGIS CESSAT IPSA LEX', THAT IS TO SAY "REASON IS THE SOUL OF THE LAW, AND WHEN THE REASON OF ANY PARTICULAR LAW CEASES, SO DOES THE LAW ITSELF.

In the judgment reported in **(1987) 2 SCC 222 (JAWAHAR LAL SINGH V. NARESH SINGH)**, the Apex Court referred to the judgment of Lord Denning M.R. in **BREEN V. AMALGAMATED ENGINEERING UNION ((1971) 1 ALL ER 1148) (CA)** wherein the Court observed "The giving of reasons is one of the fundamentals of good administration",. In **SHRI SWAMIJI OF SHRI ADMAR MUTT V. COMMISSIONER, HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS DEPARTMENT (AIR 1980 SC 1)**, the Apex Court also quoted with approval the legal maxim *cessante ratione legis cessat ipsa lex*, which means reason is the soul of law and when reason of any particular law ceases, so does

the law. In *STATE OF WEST BENGAL V. ATUL KRISHNA SHAW*, AIR 1990 SC 2205, the Apex Court reiterated that giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the Tribunal itself. Therefore, statement of reasons is one of the essentials of justice. Judicial discipline to abide by declaration of law by this Court, cannot be forsaken.

Apex Court in respect of the order passed by an administrative or quasi-judicial authority in the judgment reported in **AIR 1976 SC 1785**, (*Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Another*) wherein it has been held as follows. 6. If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of *audi alteram partem*, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its

proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders. The requirement of recording reason is applicable with greater rigor to the judicial proceedings as the orders of the Court also must reflect what weighed with the Court in declining the relief. In the book of H.W.R. Wade's 'Administrative Law, 7th Edition, it was stated as follows: ..A right to reasons is, therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice ..Reasoned decisions are not only vital for the purposes of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself..

Apex Court in the judgment reported in **2010(9) Scale 199 (M/S KRANTI ASSOCIATES PVT. LTD., & ANOTHER V. SH. MASOOD AHMED KHAN & OTHERS)**, reiterated the same law and in paragraph 51 it was held as follows: 51. Summarising the above discussion, this Court holds:

- (a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
- (b) A quasi-judicial authority must record reasons in support of its conclusions.

- (c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
- (d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- (e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.
- (f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
- (g) Reasons facilitate the process of judicial review by superior courts.
- (h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.
- (i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.
- (j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or rubber-stamp reasons is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, adequate and intelligent reasons must be given for judicial decisions.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of due process.

VOID OR VOIDABLE ORDERS NEEDS TO BE SET ASIDE BY COMPETENT AUTHORITY

In **Sultan Sadik v. Sanjay Raj Subba & Ors., AIR 2004 SC 1377**, and **Sneh Gupta v. Devi Sarup & Ors., (2009) 6 SCC 194** Court held that there cannot be any doubt that even if an order is void or voidable, the same requires to be set aside by the competent court.

In **M. Meenakshi & Ors. v. Metadin Agarwal (dead) by Lrs. & Ors., (2006) 7 SCC 470**, this Court considered the issue at length and observed that if the party feels that the order passed by the court or a statutory authority is non-est/void, he should question the validity of the said order before the appropriate forum resorting to the appropriate proceedings. The Court observed as under:- “It is well settled principle of law that even a void order is required to be set aside by a competent Court of law, inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non-est. An order cannot be declared to be void in collateral proceedings and that too in the absence of the authorities who were the authors thereof.”

COMPROMISE DECREE HAD BEEN OBTAINED BY FRAUD IS A QUESTION OF FACT

In **Jadu Gopal Chakravarty v. Pannalal Bhowmick & Ors., AIR 1978 SC 1329**, the question arose as to whether the compromise decree had been obtained by fraud. This Court held that though it is a question of fact, but because none of the courts below had pointedly addressed the question of whether the compromise in the case was obtained by perpetrating fraud

on the court, the High Court was justified in exercising its powers under Section 103 C.P.C. to go into the question.

A JUDGMENT IS AN OFFICIAL CERTIFICATION OF FACTS

In **Gurdit Singh and Ors. v. State of Punjab, AIR 1974 SC 1791**, the Supreme Court explained as under :- "A judgment of a Court is an affirmation, by the authorised societal agent of the State, speaking by the warrant of law and in the name of the State, of the legal consequences attending of proved or admitted state of facts. Its declaratory, determinative and adjudicatory function is its distinctive characteristic. Its recording gives an official certification to a pre-existing relation or establishes a new one on pre-existing grounds."

JUDGMENT AND DECREE OF A CIVIL COURT WAS NOT BINDING ON THE DEPARTMENT FOR THE REASON THAT IT WAS NOT A PARTY TO THE SUIT

Hon'ble Supreme Court in **Director of Technical Education and Anr. v. Smt. K. Sitadevi AIR 1991 SC 308** wherein the Court has categorically held that the judgment and decree of a Civil Court was not binding on the Department for the reason that it was not a party to the Suit.

JUDGMENT OF A PROBATE COURT - JUDGMENT IN REM

Surinder Kumar v. Gian Chand, AIR 1957 SC 875, wherein it was held that the judgment of a Probate Court granting probate of a will in favour of the petitioner is presumed to have been

obtained in accordance with the procedure prescribed by law and it is a judgment in rem. Judgments in rem as already observed above, are judgments binding on the whole world." therefore, the, objection that the parties in any subsequent proceedings were not parties to it, is not sustainable because of the nature of the judgment.

IF A JUDGMENT, ORDER OR DECREE HAS BEEN DELIVERED BY A COURT NOT COMPETENT TO DELIVER IT OR IT WAS OBTAINED BY FRAUD OR COLLUSION THEN SUCH JUDGMENT AND DECREE IS LIABLE TO BE IGNORED

Hon'ble the Supreme Court while placing reliance on its earlier judgment in the case of **R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1**, went on to observe that the judgments in rem as per provisions of Section 41 of the Evidence Act would not exclude an inquiry as to whether the judgment has been pronounced by a Court of competent jurisdiction as contemplated by Section 13 of the Code or it was obtained by fraud or collusion. In that regard reliance has been placed on Section 44 of the Evidence Act, which laid down an overriding principle that if a judgment, order or decree which is relevant under Sections 40, 41 or 42, has been delivered by a Court not competent to deliver it or it was obtained by fraud or collusion then such judgment and decree is liable to be ignored. A foreign Court being incompetent to try a suit relating to immovable property not situate within its jurisdiction the

grounds on which its decision relating to title to immovable property within its jurisdiction is founded will not debar investigation into title to other property within the jurisdiction of the municipal courts, even if the latter properties are alleged to be held on the same title. Every issue and every component of the issue relating to title to immovable property must be decided by the Court within whose jurisdiction it is situate: to recognise the authority of a foreign court to adjudicate upon even a component of that issue would be to recognize the authority of that Court to decide all the components thereof."

A JUDGMENT OF A COURT IS AN AFFIRMATION, BY THE AUTHORISED SOCIETAL AGENT OF THE STATE

In **Gurdit Singh and Ors. v. State of Punjab and Ors. , 1974 AIR 1791, 1974 SCR (3) 896** the Supreme Court explained as under: A judgment of a court is an affirmation, by the authorised societal agent of the State, speaking by the warrant of law and in the name of the State, of the legal consequences attending of proved or admitted state of facts. Its declaratory, determinative and adjudicatory function is its distinctive characteristic. Its recording gives an official certification to a pre-existing relation or establishes a new one on pre-existing grounds.

DECREE IN REPRESENTATIVE SUIT BINDS ALL THOSE WHOSE INTERESTS WERE REPRESENTED EITHER BY THE PLAINTIFFS OR BY THE DEFENDANT

In Raje Anandrao v. Shamrao and Ors. , 1961 AIR 1206, 1961 SCR (3) 930 the Supreme Court held that suit under Section 92 of the Code is of public nature and unless the scheme of administration or modification thereof regarding administration of the temple not affecting the private rights of Pujaris who are not parties to the suit, is binding on them. Similar view has been reiterated in *Ahmed Adam Sait and Ors. v. M.E. Makhri and Ors.* AIR 1964 SC 107, observing that when a representative suit is brought and decree is passed in such a suit, law assumes that all persons, who have the same interest as the plaintiffs in the representative suit, were represented by the said plaintiffs and, therefore, are constructively barred, by the res-judicata, from re-agitating the matters directly or substantively in issue in the said suit. A similar rule follows if the suit is either filed or defended under Order 1 Rule 8 of the Code. In that case, persons either suing or defending an action, are doing so in a representative capacity and, so, the decree passed in such a suit binds all those whose interests were represented either by the plaintiffs or by the defendant.

ORDER OBTAINED BY PLAYING FRAUD ON THE COURT, TRIBUNAL OR AUTHORITY IS A NULLITY AND NON EST IN THE EYE OF THE LAW

In the decision, **A.V.Papayyasastry vs. Govt. of A.P, reported in 2007 (4) SCC 221**, the Hon'ble Supreme Court has held as follows : "22. It is thus settled proposition of law that a judgment,

decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order by the first court or by the final court has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings."

FRAUDULENTLY OBTAINED DECREE ITS INVALIDITY CAN BE QUESTIONED EVEN AT THE STAGE OF EXECUTION OR IN COLLATERAL PROCEEDINGS

In **Urban Improvement Trust, Jodhpur vs. Gokul Narain**, reported in **AIR 1996 SC 1819**, the Hon'ble Apex Court has ruled as follows : "15...A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the Court to pass a decree which cannot be cured by consent or waive of the party. If the court has jurisdiction but there is any defect in its exercise of jurisdiction it does not go to the root of its authority..."

CIVIL PROCEDURE- EXECUTION OF DECREE - DOES NOT AUTHORIZE THE COURT TO EXECUTE THE DECREE OUTSIDE ITS JURISDICTION

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH:

Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

Section 39 of the Code does not authorize the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, Order XXI Rule 3 or Order XXI Rule 48 which provide differently, would not be affected by Section 39(4) of the Code.

COMPROMISE - WHEN A COMPROMISE IS ENTERED INTO, THE COURT HAS A DUTY TO SEE AS TO WHETHER THE SAME MEETS THE REQUIREMENTS OF LAW

ARJAN SINGH VS PUNIT AHLUWALIA & ORS. AIR 2008 SC 2718 = 2008 (8) SCR 684 = 2008 (8) SCC 348

A compromise which does not satisfy the requirements of law would be unlawful and, therefore, decree in terms thereof cannot be passed. When a compromise is entered into, the Court has a duty to see as to whether the same meets the requirements of law. It is only pursuant to or in furtherance of the said purported terms of settlement, the deed of sale was executed on 25.3.2003. The settlement entered into by and between the parties proceeded on the assumption that no decree for specific performance would be passed in the case of the appellant. It wrongly recorded that the appellant is only a proforma defendant in the suit. The said compromise, was unlawful. The trial court has rightly held that it was a case where the first part of Order 23 Rule 3 of the Code of Civil Procedure, 1908

would apply. As the appellant was not a party to the settlement, the same was not binding on him. The Trial Court, however, was right in holding that the purported compromise was bad in law. It was unlawful being without any written consent of all the parties. Indisputably, not only the same was not binding on the parties, the court in a case of this nature while considering the appellant's case shall not take note of the fact that any deed of sale has been executed pursuant thereto. Respondent No.3, as a logical corollary of these findings, would not be entitled to set up the plea of being bona fide purchaser for value without notice. The court may also pass such other order or orders, as it may deem fit and proper keeping in view its discretionary jurisdiction under Section 20 of the Specific Relief Act, 1963. To that extent the judgment of the trial court is upheld and that of the High Court set aside.

ONLY CLERICAL MISTAKES OR ARTHMETICAL MISTAKES IN JUDGMENTS ARISING FROM ANY ACCIDENTAL SLIP OR OMMISSION CAN BE CORRECTED, NO COURT CAN ADD, MODIFY OR ALTER TO THE TERMS OF ITS ORIGINAL JUDGMENT

In the case of Dwaraka Das v. State of M.P. and Another reported in (1999) 3 SCC 500 this Court described the scope of Section 152, C.P.C. thus: "6. Section 152 CPC provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders of errors arising therein from any accidental slip or omission. The

exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective orders in the lis pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order....."

**EXECUTION OF COMPROMISE DECREE AND NOT SETTING
ASIDE DECREE ON FRAUD FOR MERE NON PAYMENT OF
MONEY**

Amteshwar Anand v. Virender Mohan Singh & Ors; (2006) 1 SCC 148 where a compromise decree was sought to be subsequently re-opened on account of the alleged non- payment. It was held that mere non-payment was certainly not supportive of ground for setting aside the decree on the basis of allegation of fraud but that the applicants could execute a decree for money due under the compromise decree.

IT IS A SETTLED LEGAL PROPOSITION THAT THE COURT SHOULD NOT SET ASIDE THE ORDER WHICH APPEARS TO BE ILLEGAL, IF ITS EFFECT IS TO REVIVE ANOTHER ILLEGAL ORDER

Honourable Apex Court in Bharatiya Seva Samaj Trust v. Yogeshbhai Ambalal Patel reported in (2012) 9 Supreme Court Cases 310: “14. It is a settled legal proposition that the court should not set aside the order which appears to be illegal, if its effect is to revive another illegal order. It is for the reason that in such an eventuality the illegality would perpetuate and it would put a premium to the undeserving party/person. (Vide Gadde Venkateswara Rao v. Govt., of A.P. [AIR 1966 SC 828]; Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar [(1999) 8 SCC 16: AIR 1999 SC 3609]; Mallikarjuna Mudhagal Nagappa v. State of Karnataka [(2000) 7 SCC 238 : AIR 2000 SC 2976]; Chandra Singh v. State of Rajasthan [(2003) 6 SCC 545: 2003 SCC (L&S) 951: AIR 2003 SC 2889] and State of Uttaranchal v. Ajit Singh Bhola [(2004) 6 SCC 800.].”

IN CASE A PLEA IS RAISED AND NOT CONSIDERED PROPERLY BY THE COURT THE REMEDY AVAILABLE TO THE PARTY IS TO FILE A REVIEW PETITION.

In case a plea is raised and not considered properly by the court the remedy available to the party is to file a review petition. (Vide: State of Maharashtra v. Ramdas Shrinivas Nayak & amp; Anr., AIR 1982 SC 1249; Transmission Corporation of A.P. Ltd & amp; Ors. v. P. Surya Bhagavan, AIR 2003 SC 2182; and Mount Carmel School Society v. DDA, (2008) 2 SCC 141).

PRELIMINARY DECREE – APPEALABLE DECREE – WHEN NO APPEAL MADE PRECLUDED TO CHALLENGE AFTER FINAL DECREE

Mool Chand And Others vs Dy. Director, Consolidation AIR 1995 SC 2493 "Decree" is defined in Section 2(2) of the CPC as under : "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

Order 20 Rule 18 CPC which provides for a decree in a suit for partition of property or separate possession of a share therein, is quoted below :

18. Decree in suit for partition of property or separate possession of a share therein, then, -

(a) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

Order 26 Rules 13 & 14 provide as under :

13. Commission to make partition of immovable property-Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a

commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of commissioner-(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court set aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

Sub-Rule (2) of Rule 18 as quota above would indicate that the Court has to pass a preliminary decree where it cannot immediately partition the property in respect of which the suit was filed. The definition of "decree" contained in Section 2(2) read with the provisions contained in Order 20 Rule 18(2) as

also Order 26 Rule 14 of the Code indicate that a preliminary decree has first to be passed in a partition suit and thereafter a final decree is passed for actual separation of shares in accordance with the proceedings held under Order 26. There are, thus, two stages in suit for partition. The first stage is reached when the preliminary decree is passed under which the rights of the parties in the property in question are determined and declared. The second stage is the stage when a final decree is passed which concludes the proceedings before the Court and the suit is treated to have come to an end for all practical purposes.

Preliminary Decree is an appealable decree. Section 97 of the CPC provides as under : Appeal from final decree where no appeal from preliminary decree - Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. Thus, if an appeal is not filed against the preliminary decree and its correctness is not challenged, it becomes final and the party aggrieved thereby will not be permitted to challenge its correctness in an appeal against final decree.

ORDINARILY THE PRELIMINARY DECREE SETTLES THE RIGHTS OF THE PARTIES AND THE FINAL DECREE WORKS OUT THOSE RIGHTS

A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the

matters dealt with by it are concerned, be regarded as embodying the final decision of the Court passing that decree....**Gyarsi Rai And Others vs Dhansukh Lal And Others AIR 1964 SC 1044** It is true that a preliminary decree is final in respect of the matters to be decided before it is made. It is indisputable that in a mortgage suit there will be two decrees, namely preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights.

IN A SUIT FOR PARTITION BY A COPARCENER OR CO-SHARER, THE COURT SHOULD NOT GIVE A DECREE ONLY FOR THE PLAINTIFF'S SHARE, IT SHOULD CONSIDER SHARES OF ALL THE HEIRS AFTER MAKING THEM PARTIES AND THEN TO PASS A PRELIMINARY DECREE.

In *Shankar Balwant Lokhande (d) by Lrs. v. Chandrakant Shankar Lokhande and Anr.* AIR 1995 SC 1211, while considering the provisions of order 20 Rule 18, CPC as also the period prescribed for the execution of decree, under the Limitation Act, it was observed as under: Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property, The Court is also empowered to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suk which continues until the final decree is passed. In a suit for partition by a coparcener

or co-sharer, the court should not give a decree only for the plaintiff's share, it should consider shares of all the heirs after making them parties and then to pass a preliminary decree. ' The words "Declaring the rights of the several parties interested in the property, in Sub-rule (2) would indicate that shares of the parties other than the plaintiff(s), have to be taken into account while passing a preliminary decree. Therefore, preliminary decree for parties is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subject-matter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper.

LEGAL REPRESENTATIVES OF THE DECEASED DEFENDANT, AGAINST WHOM THE DECREE FOR INJUNCTION IS PASSED, WOULD BE LIABLE FOR VIOLATION OF THAT DECREE - THROUGH ATTACHMENT OF THE PROPERTY OF THE DECEASED - ARREST AND DETENTION IN CIVIL PRISON CANNOT BE ENFORCED

Karnataka High Court has held in Hajaresab -v.- Udachappa, since deceased by his L.Rs., and others. ILR 1984 KAR 900 "

Therefore, under these circumstances, what emerges is that though the decree for injunction does not run with the land, still under Section 50 of the Code of Civil Procedure, the legal representatives of the deceased defendant, against whom the

decree for injunction is passed, would be liable for violation of that decree. However, their liability, as held in Sakarlal's Case, would be limited to the attachment of the property of the deceased, which has come to their hands. The other penalty imposed by Order 21 Rule 32 of the Code of Civil Procedure, by arrest and detention in Civil prison cannot be enforced in the case of the legal representatives at all."

CONSTRUCTION OF COMPROMISE DECREE

In HABIB MIAN AND ANR. v. MUKHTAR AHMAD AND ANR. AIR 1969 All 296. (FB), a Full Bench of the Allahabad High Court has stated the principle thus: "I think it necessary at the outset to examine the provisions of the compromise decree and to ascertain how the several rights and liabilities between the parties have been distributed under the decree. In doing so, the principles of construction of a compromise decree must be borne in mind. There is authority for the proposition that a compromise decree is a creature of the agreement on which it is based and is subject to all the incidents of such agreement, that it is but a contract with the command of a Judge superadded to it and in construing its provisions the fundamental principles governing the construction of contracts are applicable." "One of the cardinal principles in the construction of contracts is that the entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations. It is through the prism of that

principle that the terms of the compromise decree must be analysed."

In Sopan Sukhdeo Sable and Ors. Vs. Assistant Charity Commissioner and Ors., (2004) 3 SCC 137, Court held thus:

"15. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction or words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities."

A SUBSEQUENT ACTION/DEVELOPMENT CANNOT VALIDATE AN ACTION WHICH WAS NOT LAWFUL AT ITS INCEPTION

It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at

the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironical to permit a person to rely upon a law, in violation of which he has obtained the benefits. **(Vide Upen Chandra Gogoi Vs. State of Assam & Ors., (1998) 3 SCC 381; Satchidananda Misra Vs. State of Orissa & Ors., (2004) 8 SCC 599; and Regional Manager, SBI Vs. Rakesh Kumar Tewari, (2006) 1 SCC 530).**

In C. Albert Morris Vs. K. Chandrasekaran & Ors., (2006) 1 SCC 228, Court held that a right in law exists only and only when it has a lawful origin.

In Mangal Prasad Tamoli (dead) by LRs. Vs. Narvadeshwar Mishra (dead) by LRs. & Ors., (2005) 3 SCC 422, Court held that if an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non-est and have to be necessarily set aside.

IMPORTANCE OF FILE NOTINGS

In Sethi Auto Service Station v. DDA, (2009) 1 SCC 180, the Supreme Court has held that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.

A JUDGMENT OBTAINED BY PLAYING FRAUD ON THE COURT IS A NULLITY

In A.V. Papayya Sastry v. Government of A.P., (2007) 4 SCC 221, the Supreme Court held that a judgment obtained by playing fraud on the Court is a nullity. The relevant portion is as under:-Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:—Fraud avoids all judicial acts, ecclesiastical or temporal.....It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order--by the first court or by the final court--has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.....In the leading case of *Lazarus Estates Ltd. v. Beasley* [(1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA)] Lord Denning observed: (All ER p. 345 C) —No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud.....In *Duchess of Kingstone*, Smith's Leading Cases, 13th Edn., p. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was —mistaken, it might be shown that it was —misled. There is an essential distinction

between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment..... It has been said: fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).....Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of —finality of litigation cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

JUDGEMENT WHEN WRITTEN STATEMENT WAS NOT FILED

Hon'ble Apex Court referring to *Bogidhola Tea & Trading Co. Ltd., V/s. Hira Lal Somani* [MANU/SC/8233/2007 : (2007) 14 SCC 606], has held that the relief under Order 8 Rule 10 CPC is discretionary and Court has to be more cautious while exercising such power where the defendant fails to file the written statement. Even in such circumstances, the Court must be satisfied that there is no fact which needs to be proved in spite of

deemed admission by the defendant and the Court must give reasons for passing such judgment. However, short it be, but by reading the said judgment, a party must understand what were the facts and circumstances on the basis of which the Court must proceed and on what reasoning the suit has been decreed.

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CHAPTER

POSSESSION - ADVERSE POSSESSION

ADVERSE POSSESSION

It is trite that possession is not an adverse possession. A person may remain in possession for a long time yet, such possession will not mature into an adverse possession. It has been now held by the Supreme Court that a person who claims adverse possession must bring the aspect of claim of adverse possession to the knowledge of the true owner. A person pleading adverse possession has no equities in his favor. A recent judgment of the Supreme Court in this regard as to adverse possession is the judgment in the case of **Chatti Konati Rao and Others vs. Palle Venkata Subba Rao (2010)14SCC 316**. The relevant paras of this judgment are paras 12 to 15 and these paras read as under:- "12. We have bestowed our thoughtful consideration to the submission advanced and we do not find any substance in the submission of Mr. Bhattacharya. What is adverse possession, on whom the burden of proof lie, the approach of the court towards such plea etc. have been the subject matter of decision in a large number of cases. In the case of T. Anjanappa v. Somalingappa, it has been held that mere

possession however long does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owner's title. Relevant passage of the aforesaid judgment reads as follows: "20. It is well-recognized proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

13. What facts are required to prove adverse possession have succinctly been enunciated by this Court in the case of Karnataka Board of Wakf vs. Government of India and Ors. It has also been observed that a person pleading adverse possession has no equities in his favour and since such a person is trying to defeat the rights of the true owner, it is for him to clearly plead and establish necessary facts to establish his adverse possession. SCC Para 11 of the judgment which is relevant for the purpose reads as follows: "11. In the eye of the law, an owner would be

deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See *S.M. Karim v. Bibi Sakina*, *Parsinni v. Sukhi* and *D.N. Venkatarayappa v. State of Karnataka*) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts

necessary to establish his adverse possession. (Mahesh Chand Sharma v. Raj Kumari Sharma)"

14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within 12 years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of 12 years thereafter.

15. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to

defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights. Plea of adverse possession is not a pure question of law but a blended one of fact and law."

TO CONSTITUTE ADVERSE POSSESSION THE POSSESSION PROVED MUST BE ADEQUATE IN CONTINUITY, IN PUBLICITY AND IN EXTENT SO AS TO SHOW THAT IT IS ADVERSE TO THE TRUE OWNER

Hon^{ble} Supreme Court in T. Anjanappa & Ors. v. Somalingappa & Anr. reported at (2006) 7 SCC 570 has rejected such a plea overturning the decision of the High Court to the contrary. In paras 16 and 17, the Hon^{ble} court stated thus: "16. It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there

should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

17. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Governemnt was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. ..."

ADVERSE POSSESSION CLAIM BY PLAINTIFF

Court in *Gurdwara Sahib v. Gram Panchayat Village Sirthala and Anr.* MANU/SC/0939/2013 : 2014 (1) SCC 669, has held in para 8 that a plea of adverse possession cannot be set up by the Plaintiff to claim ownership over the suit property but such plea can be raised by the Defendant by way of defence in his written statement in answer to the Plaintiff's claim.

Court again in *Chatti Konati Rao and Ors. v. Palle Venkata Subba Rao* MANU/SC/1033/2010 : (2010) 14 SCC 316 in Para 14 held as under:

14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said is that mere possession however long does not necessarily mean that it is

adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The Plaintiff is bound to prove his title as also possession within twelve years and once the Plaintiff proves his title, the burden shifts on the Defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the Defendant should be adverse to the Plaintiff and the Defendant must continue to remain in possession for a period of twelve years thereafter.

HOSTILE ENOUGH TO BRING THE SAME TO THE KNOWLEDGE OF THE OWNER

P.T. Munichikkanna Reddy and Others vs. Revamma and Others (2007) 6 SCC 59. In paras 19, 21 and 23 of this judgment the Supreme Court has observed that intention to dispossess needs to be open and hostile enough to bring the same to the knowledge of the owner. Supreme Court has held that it is necessary that intention has to be proved of a person to be in adverse possession and the issue is that intention of the adverse user gets communicated to the owner of the property. It was therefore held that the possession of the adverse possessor

must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner.

IN VACANT SITES WITHOUT A FINDING ON TITLE CANNOT DECIDE THE ISSUE OF POSSESSION

Apex Court reported in AIR 2008 SC 2033 (Anathula Sudhakar v. P.Buchi Reddy (dead) by legal heirs and others)

wherein it was specifically held that where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter. Para-17 is extracted hereunder: 17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in *Annaimuthu Thevar* (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for

injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

CHAPTER EASEMENT AND TRUST

PRINCIPLES TO ASCERTAIN THE NATURE OF TRUST WHETHER ITS PUBLIC OR PRIVATE

In State of W.B. v. Sri Sri Lakshmi Janardan Thakur [(2006) 7 SCC 490], this Court opined: "In order to ascertain whether a trust is private, the following factors are relevant:

- (1) If the beneficiaries are ascertained individuals.
- (2) If the grant has been made in favour of an individual and not in favour of a deity.
- (3) The temple is situated within the campus of the residence of the donor.

(4) If the revenue records or entries suggest the land being in possession of an individual and not in the deity.

On the other hand an inference can be drawn that the temple along with the properties attached to it is a public trust:

(1) If the public visit the temple as of right.

(2) If the endowment is in the name of the deity.

(3) The beneficiaries are the public.

(4) If the management is made through the agency of the public or the accounts of the temple are being scrutinised by the public."

EASEMENTARY RIGHT BY WAY OF IMPLIED GRANT 2010 SC

Justice Tarun Chatterjee and Justice V.S. Sirpurkar in a case of **SREE SWAYAM PRAKASH ASHRAMAM & ANR. .Vs. G. ANANDAVALLY AMMA & ORS.** Reported in **AIR 2010 SC 622**, The case of the defendants-appellants that since there was no mention in the deed of settlement enabling the use of 'B' schedule pathway for access to 'A' schedule property and the building therein, cannot be the reason to hold that there was no grant as the grant could be by implication as well. The facts and circumstances of the case amply show that there was an implied grant in favour of the original plaintiff (since deceased) relating to 'B' schedule property of the plaintiff for its use as pathway to 'A' schedule property of the plaintiff in residential occupation of the original plaintiff (since deceased). In absence of any evidence being adduced by the appellants to substantiate their contention that the original plaintiff (since deceased) had an alternative

pathway for access to the 'A' schedule property, it is difficult to negative the contention of the respondent that since the original plaintiff (since deceased) has been continuously using the said pathway at least from the year 1940 the original plaintiff (since deceased) had acquired an easement right by way of an implied grant in respect of the 'B' Schedule property of the plaintiff. The High Court was perfectly justified in holding that when it was the desire of 'Y' to grant easement right to the original plaintiff (since deceased) by way of an implied grant, the right of the original plaintiff (since deceased) to have 'B' schedule property of the plaintiff as a pathway could not have been taken away. The High Court was fully justified in holding that there was implied grant of 'B' schedule property as pathway, which can be inferred from the circumstances for the reason that no other pathway was provided for access to 'A' schedule property of the plaintiff and there was no objection also to the use of 'B' schedule property of the plaintiff as pathway by the original plaintiff (since deceased) at least up to 1982, when alone the cause of action for the suit arose.

The Trial Court on consideration of the plaintiff's evidence and when the defendant had failed to produce any evidence, had come to the conclusion that the plaintiff was given right of easement by 'Y' as an easement of grant. Considering this aspect of the matter, although there is no specific issue on the question of implied grant, but as the parties have understood their case and for the purpose of proving and contesting implied grant had adduced evidence, the Trial Court and the High Court had come

to the conclusion that the plaintiff had acquired a right of easement in respect of 'B' schedule pathway by way of implied grant. Such being the position, this Court cannot upset the findings of fact arrived at by the Courts below, in exercise of its powers under Article 136 of the Constitution. It is true that the defendant-appellants alleged that no implied grant was pleaded in the plaint. However, the Trial Court was justified in holding that such pleadings were not necessary when it did not make a difference to the finding arrived at with respect to the easement by way of grant.

TRUST CANNOT BE TRANSFERRED TO SOCIETY

In Abdul Kayum vs. Mulla Alibhai MANU/SC/ 0385/1962 : AIR 1963 SC 309 , a question arose before the Apex Court that whether a Trust created for governing, managing, administering the affairs of a School can form a Society subsequently for the purpose of running the School. In that context, the Hon'ble Apex Court has held as follows: "16. There cannot, in our opinion, be any doubt about the correctness of the legal position that trustees cannot transfer their duties, functions and powers to some other body of men and create them trustees in their own place unless this is clearly permitted by the trust deed, or agreed to by the entire body of beneficiaries. A person who is appointed a trustee is not bound to accept the trust, but having once entered upon the trust he cannot renounce the duties and liabilities except with the permission of the Court or with the consent of the beneficiaries or by the authority of the trust deed

itself. Nor can a trustee delegate his office or any of his functions except in some specified cases. The rules against renunciation of the trust by a trustee and against delegation of his functions by a trustee are embodied, in respect of trusts to which the Indian Trusts Act applies, in ss. 46 and 47 of that Act. These sections run thus:-

'46. A trustee who has accepted the trust cannot afterwards renounce it except (a) with the permission of a principal Civil Court of Original Jurisdiction, or (b) if the beneficiary is competent to contract, with his consent, or (c) by virtue of a special power in the instrument of trust.

47. A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation.'

INDIAN TRUST ACT APPLICABLE ONLY TO PRIVATE TRUSTS AND NOT TO PUBLIC TRUSTS

Thayarammal v. Kanakammal MANU/SC/1034 /2004 : 2005

(1) SCC 457 - the Hon'ble Supreme Court has held that the Indian Trust Act, has clear by its preamble and contentions is applicable only to Private Trusts and not to Public Trusts and the relevant paragraph is extracted hereunder:- "15. The contents of the stone inscription clearly indicate that the owner has dedicated the property for use as 'Dharamchatra' meaning a resting place for the travelers and pilgrims visiting the Thyagraja

Temple. Such a dedication in the strict legal sense is neither a 'gift' as understood in the Transfer of Property Act which requires an acceptance by the donee of the property donated nor it is a 'trust'. The Indian Trusts Act as clear by its Preamble and contents is applicable only to private trusts and not to public trusts. A dedication by a Hindu for religious or charitable purposes is neither a 'gift' nor a 'trust' in the strict legal sense."

CHAPTER APPEAL

FIRST APPELLATE COURT

In the case of Santor Hazari reported in (2001) 3SCC 179 Hon'ble Supreme Court has discussed the nature, scope and responsibility of the first appellate Court. First appellate Court was not supposed to step in scarily agreeing to the findings of the learned trial Court. It had to consider the evidence independently and thereupon decide as to whether learned trial Court had arrived at the findings of fact and law in correct and proper way. Framing point for determination and deciding the same is only a prescribed means for such objective to be achieved by the learned first appellate Court. If appellate Court without point for

determination decides the case issue wise and in so doing the evidences led by the parties are taken into consideration independently and thereupon findings are arrived at that stage it would be substantial compliance of the provision of Order XLI Rule 31 of the Code of Civil Procedure. Having so found, let us see whether first appellate Court in the present case has substantially complied with the aforesaid norms and guidelines.

DUTY OF FIRST APPELLATE COURT

Court in State of **Rajasthan v. Harphool Singh (dead) through his L.Rs. MANU/SC/0348/2000 : (2000) 5 SCC 652** took note of the exception to the judgment passed by the first appellate court by observing that there was no due or proper application of mind or any critical analysis or objective consideration of the matter, despite the same being the first appellate court.

A three-Judge Bench in **Santosh Hazari v. Purushottam Tiwari (deceased) by L.Rs. MANU/SC/0091/2001 : (2001) 3 SCC 179**, while discussing about power of the first appellate court, has opined that it is the final court of facts and, therefore, pure findings of fact remain immune from challenge before the High Court in second appeal. "... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings

supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (See *Girijanandini Devi v. Bijendra Narain Choudhary* MANU/SC/0287/1966 : AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. ...” Court, after referring to the decision in *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh* MANU/SC/0002/1950 : AIR 1951 SC 120, has further opined that: “... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. ...”

PERVERSE ORDER - PERVERSITY

In **M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58**, the Court observed that any order made in conscious violation of pleading and law is a perverse order. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in **Damodar Lal vs. Sohan Devi and others (2016) 3 SCC 78** wherein it was held as under:- "8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.....9. In **Krishnan v. Backiam (2007) 12 SCC 190**, it has been held at paragraph-11 that: (SCC pp. 192-93) "11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

In **S.R. Tiwari v. Union of India (2013) 6 SCC 602**, after referring to the decisions of Court, starting with **Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC 635**, it was held at para 30: (S.R.Tewari case6, SCC p. 615) "30. The findings of fact recorded by a court can be held to be perverse if the findings

have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide *Rajinder Kumar Kindra v. Delhi Admn.* [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , *Kuldeep Singh v. Commr. of Police* [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , *Gamini Bala Koteswara Rao v. State of A.P.* [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and *Babu v. State of Kerala* [(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"

CONDITIONS MENTIONED IN THE SECTION MUST BE STRICTLY FULFILLED BEFORE AN APPEAL CAN BE MAINTAINED AND NO COURT HAS THE POWER TO ADD TO OR ENLARGE THOSE GROUNDS

In *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors.*, AIR 1999 SC 2213, Court held as under:- "It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right it has to be regulated in accordance with law in

force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before an appeal can be maintained and no Court has the power to add to or enlarge those grounds. The appeal cannot be decided on merit on merely equitable grounds."

In Vijay Prakash D. Mehta & Jawahar D. Mehta v. Collector of Customs (Preventive), Bombay, AIR 1988 SC 2010, Court held as under:- "Right to appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial or quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grantThe purpose of the Section is to act in terrorem to make the people comply with the provisions of law."

Anant Mills Co. Ltd. v. State of Gujarat, AIR 1975 SC 1234; and Shyam Kishore & Ors. v. Municipal Corporation of Delhi & Anr., AIR 1992 SC 2279. A Constitution Bench court in *Nandlal & Anr. v. State of Haryana*, AIR 1980 SC 2097, held that the "right of appeal is a creature of statute and there is no reason why the legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory."

In Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors., (1999) 4 SCC 468, Court held that the right of appeal though statutory, can be

conditional/qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided for under the statute and when a law authorises filing of an appeal, it can impose conditions as well.

WHEN THERE IS MISCONSTRUCTION OF A DOCUMENT OR WRONG APPLICATION OF A PRINCIPLE OF LAW IN CONSTRUING A DOCUMENT, IT GIVES RISE TO A QUESTION OF LAW

Hero Vinoth v. Seshammal 2006 AIR SCW 2833, the Apex Court after referring to several of its earlier decisions on the principles under Section 100 of CPC, summarised the law at para 24 in the said decision which reads as under: “The principles relating to Section 100 summarised as follows: (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law. (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of

law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law. (iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognised exceptions are where (a) the Courts below have ignored material evidence or acted on no evidence: (b) the Courts have drawn wrong inferences from proved facts by applying the law erroneously or (c) the courts have wrongly cast the burden of proof. When refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

Sir Chunilal V. Mehta and sons Ltd. v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 Supreme Court 1314, wherein it was held that the construction of a document of title or of a document which is the foundation of the right of the parties necessarily raises a question of law.

TO BE 'SUBSTANTIAL' A QUESTION OF LAW MUST BE DEBATABLE, NOT PREVIOUSLY SETTLED BY LAW OF THE LAND OR A BINDING PRECEDENT

In the case of **Santosh Hazari v. Purushottam Tiwari, AIR 2001 SC page 965** it was held by the Apex Court that "substantial" in context means, having substance, essential, real, of sound worth, important or considerable and the question of law must be debatable, one which has not been settled earlier by statute or binding precedent and must have a material bearing on the outcome of the case and also observed that in respect of finding of fact, the first appellate court apart from being the final court of facts, held, the first appellate court is also a final court of law in that its decision on a question of law to no longer assailable before the High Court, unless such question is a substantial question of law. "A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for

striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

HIGH COURT HAD NO JURISDICTION TO ENTERTAIN SECOND APPEAL ON FINDING OF FACT EVEN IF IT WAS ERRONEOUS

In the case of **Mst. Kharbuja Kuer v. Jangbahadur Rai, 1963 (1) SCR 456**, Court held that the High Court had no jurisdiction to entertain second appeal on finding of fact even if it was erroneous. In this connection this Court observed as follows : "It is settled law that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact."

Court in the case of **R. Ramachandran Ayyar v. Ramalingam Chittiar, 1963 (3) SCR 604**, where the Court observed as follows: "But the High Court cannot interfere with the conclusion of fact recorded by the lower appellate Court, however, erroneous the said conclusion may appear to be to the High Court, because, as the Privy Council observed, however, gross or inexcusable the error may seem to be there is no jurisdiction under Section 100 to correct that error."

In **Sir Chunilal V. Mehta & Sons Ltd. Vs. The Century Spinning and Manufacuring Co., Ltd., (1962) Supp.3 SCR 549**, the Constitution Bench expressed agreement with the following view taken by a Full Bench of Madras High Court in

Rimmalapudi Subba Rao Vs. Noony Veeraju, ILR 1952 Madras 264:- .. when a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative view, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest Court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law. And laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:- The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

In **Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate Vs. Rama Krishna Narain & Ors., AIR 1953 SC 521**, also it was held that a question of law of importance to

the parties was a substantial question of law entitling the appellant to certificate under (the then) Section 110 of the Code. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

**HIGH COURT POWERS OVER SUBORDINATE COURTS AFTER
2002 WHEN REVISION POWERS WERE MODIFIED FOR
INTERLOCUTORY ORDERS 2003 SC**

Apex Court in the case of **Surya Dev Rai V. Ram Chander Rai (2003) 6 SCC 675**

"38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:

(1) Amendment by Act 46 of 1999 with effect from 1.7.2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though

available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long- drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory

jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

APPEAL BEING A CONTINUATION OF THE SUIT

In Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165, the Supreme Court ruled". It is a fixed principle of law that a suit must be tried on the original cause of action and this principle governs not only the trial of the suits but also appeals. The appeal being a continuation of the suit new pleas are not considered."

Hon'ble Supreme Court in the case of **Gurdev Kaur and Ors. v. Kaki and Ors. 2006 AIR SCW 2404**. The duty of the Court would only be to test the authenticity of the WILL in terms of Section 63 of Indian Succession Act. Any and every circumstance is not a suspicious circumstance. A circumstance would be suspicious when it is not normal or is not, normally expected in a normal situation or is not expected of a normal person. A WILL is normally executed to interrupt the normal succession so that the testator would prefer some and exclude others and as such it cannot be said that. it. is unnatural or suspicious. Therefore, the authenticity of the document would have to be considered.

RIGHT TO APPEAL IS A STATUTORY RIGHT - RIGHT OF APPEAL IS NEITHER A NATURAL NOR AN INHERENT RIGHT ATTACHED TO THE LITIGATION

In **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors., AIR 1999 SC 2213**, Court held as under:- "It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive

statutory right it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before an appeal can be maintained and no Court has the power to add to or enlarge those grounds. The appeal cannot be decided on merit on merely equitable grounds."

RIGHT TO APPEAL IS NEITHER AN ABSOLUTE RIGHT NOR AN INGREDIENT OF NATURAL JUSTICE

In **Vijay Prakash D. Mehta & Jawahar D. Mehta v. Collector of Customs (Preventive), Bombay, AIR 1988 SC 2010**, Court held as under:- "Right to appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial or quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grantThe purpose of the Section is to act in terrorem to make the people comply with the provisions of law."

A constitutional Bench of Supreme Court in **Garikapati Veeraya v. N. Subbiah Choudhry, MANU/SC/0008/1957 : AIR 1957 SC 540**, laid down following principles:-

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

- (ii) The right of appeal is not a mere matter of procedure but is a substantive right.
- (iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.
- (iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.
- (v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

STATUTORY RIGHT OF APPEAL CAN BE CURTAILED WITH REASONABLE RESTRICTIONS

A Constitution Bench court in Nandlal & Anr. v. State of Haryana, AIR 1980 SC 2097, held that the "right of appeal is a creature of statute and there is no reason why the legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not so

onerous as to amount to unreasonable restrictions rendering the right almost illusory".

RIGHT OF APPEAL THOUGH STATUTORY, CAN BE CONDITIONAL/QUALIFIED

In Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors., (1999) 4 SCC 468, Court held that the right of appeal though statutory, can be conditional/qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided for under the statute and when a law authorises filing of an appeal, it can impose conditions as well.

Supreme Court in Nookala Seetharamaiah v. Kotaiah Naidu, AIR 1970 SC 1354, "Broadly speaking, a party or person is aggrieved by a decision when, and only when it operates directly and injuriously upon his personal, pecuniary or property rights"
 " In legal acceptation a party or person is aggrieved by a judgment, decree or order, so as to be entitled to appealwhenever it operates prejudicially and directly upon his property or pecuniary rights, or upon his personal rights and only when it has such effect"

WHAT IS SUBSTANTIAL QUESTION OF LAW- THERE MUST BE FIRST A FOUNDATION FOR IT LAID IN THE PLEADINGS AND THE QUESTION SHOULD EMERGE FROM THE

SUSTAINABLE FINDINGS OF FACT ARRIVED AT BY COURT OF FACTS AND IT MUST BE NECESSARY TO DECIDE THAT QUESTION OF LAW FOR A JUST AND PROPER DECISION OF THE CASE

IN THE SUPREME COURT OF INDIA, in case of **Vijay Kumar Talwar vs Commnr. Of Income Tax, Delhi 2010 (14) SCR 499 = 2011 (1) SCC 673** Hon'ble Justice D.K. JAIN Justice T.K.Thakur quoted following citations to explain "Substantial question of law".

In **Sir Chunilal V. Mehta & Sons, Ltd. Vs. Century Spinning and Manufacturing Co. Ltd. AIR 1962 SC 1314**, a Constitution Bench Court, while explaining the import of the said expression, observed that: "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

Similarly, in Santosh Hazari Vs. Purushottam Tiwari (2001) 3 SCC 179 a three judge Bench Court observed that: "A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

In Hero Vinoth (Minor) Vs. Seshammal (2006) 5 SCC 545 , Court has observed that: "The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn

wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

FINDING BASED ON NO EVIDENCE OR IN DISREGARD OF EVIDENCE OR ON IN-ADMISSIBLE EVIDENCE OR ON ASSUMPTIONS OF FACTS WITHOUT INQUIRY, SUCH FINDINGS CAN BE DISTURBED IN SECOND APPEAL

In Jagdish Singh v. Natthu Singh, AIR 1992 SC 1604 it has been held by the Hon'ble Supreme Court that where the finding by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings.

In Kashibai v. Parwatibai (1995) 6 SCC 213 : (1995 AIR SCW 4631). it has been held by the Hon'ble Supreme Court that High Court cannot reappreciate the evidence and interfere with the concurrent findings of fact of courts below without even formulating any question of law. The High Court has no jurisdiction to entertain a second appeal on ground of erroneous findings of fact, based on appreciation of relevant evidence.

In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, AIR 1999 SC 2213, the Hon'ble Supreme Court has held that

concurrent findings of fact, howsoever erroneous, cannot be disturbed by the High Court in exercise of powers under Section 100, C.P.C.

In Roop Singh v. Ram Singh, 2000 AIR SCW 1001 : (AIR 2000 SC 1485), it has been held by the Hon'ble Supreme Court that under Section 100 of the C. P. C., jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100, C. P. C.

SUBSTANTIAL QUESTION OF LAW

As was noted in **Yadarao Dajiba Shrawane (dead) by Lrs. v. Nanilal Harakchand Shah (dead) and Ors. (2002 (6) SCC 404)** if the judgments of the trial Court and the first Appellate Court are based on mis-interpretation of the documentary evidence or consideration of inadmissible evidence or ignoring material evidence or on a finding of fact has ignored admissions or concession made by witnesses or parties, the High Court can interfere in appeal.

In Neelakantan and Ors. v. Mallika Begum (2002 (2) SCC 440) it was held that findings of fact recorded must be set aside where the finding has no basis in any legal evidence on record or is based on a misreading of evidence or suffers from any legal

infirmity which materially prejudices the case of one of the parties. (See: Krishna Mohan Kul alias Nani Charan Kul and Another v. Pratima Maity and others [(2004) 9 SCC 468]).

Hon'ble Supreme court reported in (2006)5 SCC 545 in the case of Hero Vinoth (Minor) vs Seshammal on 8 May, 2006

It is now well settled that an inference of fact from a document is a question of fact. But the legal effect of the terms or a term of a document is a question of law. Construction of a document involving the application of a principle of law, is a question of law. Therefore, when there is a misconstruction of a document or wrong application of a principle of law while interpreting a document, it is open to interference under Section 100 CPC. If a document creating an easement by grant is construed as an 'easement of necessity' thereby materially affecting the decision in the case, certainly it gives rise to a substantial question of law.

Court in Reserve Bank of India v. Ramkrishna Govind Morey (1976 (1) SCC 803) held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference.

Hon'ble Supreme court reported in (2006)5 SCC 545 in the case of Hero Vinoth (Minor) vs Seshammal on 8 May, 2006

The principles relating to Section 100 CPC, relevant for this case, may be summerised thus:-

- (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of

a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a

total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

In Bholaram v. Amirchand (1981) 2 SCC 414 a three- Judge Bench of Court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J.,

In *State Bank of India & Ors. v. S.N. Goyal*, AIR 2008 SC 2594, this Court explained the terms “substantial question of law” and observed as under : “The word ‘substantial’ prefixed to ‘question of law’ does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. ‘Substantial questions of law’ means not only substantial questions of law of general

importance, but also substantial question of law arising in a case as between the parties. any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case.” (Emphasis added)

Similarly, in Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, this Court for the purpose of determining the issue held:- “The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties.....” (Emphasis added)

In Vijay Kumar Talwar v. Commissioner of Income Tax, New Delhi, (2011) 1 SCC 673, this Court held that, a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it

must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstance of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis." (See also: *Rajeshwari v. Puran Indoria*, (2005) 7 SCC 60).

The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a sine-qua-non for the exercise of jurisdiction under the provisions of Section 100 CPC. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence.

There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained as under:-

"A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong." (Vide: *Salmond, on Jurisprudence*, 12th Edn. page 69, cited in

Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil & ors., AIR 1994 SC 678).

In Smt. Bibhabati Devi v. Ramendra Narayan Roy & Ors., AIR 1947 PC 19, the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing as under:- “..... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word ‘judicial procedure’ at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law.

“That the question of admissibility of evidence is a proposition of law but it must be such as to affect materially the finding. The question of the value of evidence is not sufficient reason for departure from the practice.....”

In Suwalal Chhogalal v. Commissioner of Income Tax, (1949) 17 ITR 269, Court held as under:- “A fact is a fact irrespective of evidence, by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient evidence.”

In Oriental Investment Company Ltd. v. Commissioner of Income Tax, Bombay, AIR 1957 SC 852, Court considered a large number of its earlier judgments, including *Sree Meenakshi Mills Ltd., Madurai v. Commissioner of Income Tax, Madras, AIR 1957 SC 49*, and held that where the question of decision is whether certain profit is made and shown in the name of certain intermediaries, were, in fact, profit actually earned by the assessee or the intermediaries, is a mixed question of fact and law. The Court further held that inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a “mixed question of law and fact” and that a finding of fact without evidence to support it or if based on relevant or irrelevant matters, is not unassailable.

There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse. (Vide: *Jagdish Singh v. Nathu Singh, AIR 1992 SC 1604*; *Smt. Prativa Devi (Smt.) v. T.V. Krishnan, (1996) 5 SCC 353*; *Satya Gupta (Smt.) @ Madhu Gupta v. Brijesh Kumar, (1998) 6 SCC 423*; *Ragavendra Kumar v. Firm Prem Machinery & Co., AIR 2000 SC 534*; *Molar Mal (dead) through Lrs. v. M/s. Kay Iron Works Pvt. Ltd., AIR 2000 SC 1261*; *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685*; and *Dinesh Kumar v. Yusuf Ali, (2010) 12 SCC 740*).

In Jai Singh v. Shakuntala, AIR 2002 SC 1428, Court held that it is permissible to interfere even on question of fact but it may be only in “very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible it is a rarity rather than a regularity and thus in fine it can thus be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection.” Similar view has been taken in the case of Kashmir Singh v. Harnam Singh & Anr., AIR 2008 SC 1749.

Declaration of relief is always discretionary. If the discretion is not exercised by the lower court “in the spirit of the statute or fairly or honestly or according to the rules of reason and justice”, the order passed by the lower court can be reversed by the superior court. (See: Mysore State Road Transport Corporation v. Mirja Khasim Ali Beg & Anr., AIR 1977 SC 747).

In State Bank of India & Ors. v. S.N. Goyal, MANU/SC/7605/2008 : AIR 2008 SC 2594, the Supreme Court explained the terms "substantial question of law" and observed as under: "The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties..... any question of law which affects the

final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case."

Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.: MANU/GJ/0774/2018

There may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal.

WHEN THERE WAS NO PERVERSITY, ILLEGALITY OR IRREGULARITY IN THOSE FINDINGS – COURT CANNOT INTERFERE

In Ishwar Dass Jain v. Sohan Lal (2000 (1) SCC 434) this Court in para 10, has stated thus: "10. Now under Section 100, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate Court without doing so."

Roop Singh v. Ram Singh (2000 (3) SCC 708) this Court has expressed that the jurisdiction of a High Court is confined to appeals involving substantial question of law. Para 7 of the said judgment reads: "7. It is to be reiterated that under section 100 jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under section 100. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, the fact findings courts after appreciating the evidence held that the defendant entered into the possession of the premises as a batai, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the

possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession (Thakur Kishan Singh v. Arvind Kumar (1994 (6) SCC 591). Hence the High Court ought not to have interfered with the findings of fact recorded by both the courts below." The position has been reiterated in Kanahaiyalal and Ors. v. Anupkumar and Ors. (JT 2002 (10) SC 98)

Kashmir Singh vs Harnam Singh & Anr on 3 March, 2008

Bench: Dr. Arijit Pasayat, P. Sathasivam, Aftab Alam After the amendment, a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice is done to the litigant where

such a question was not formulated at the time of admission either by mistake or by inadvertence.

9. It has been noted time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the Code. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section in several cases, the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of the powers under this section. Further, a substantial question of law has to be distinguished from a substantial question of fact.

**TEST FOR DETERMINING WHETHER A QUESTION OF LAW
RAISED IN THE CASE IS SUBSTANTIAL**

Court in Sir Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. (AIR 1962 SC 1314) held that : "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

The question of law raised will not be considered as a substantial question of law, if it stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court. Where the facts required for a point of law have not been pleaded, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. Mere appreciation of facts, the documentary evidence or the meaning of entries and the contents of the documents cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is

shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in *Reserve Bank of India v. Ramkrishna Govind Morey* (1976 (1) SCC 803) held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference. ([See: *Kondiba Dogadu Kadam v. Savitribai Sopan Gujar and Others* (1999(3) SCC 722)]).

Kashmir Singh vs Harnam Singh & Anr on 3 March, 2008

Bench: Dr. Arijit Pasayat, P. Sathasivam, Aftab Alam It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was

based upon inadmissible evidence or arrived at by ignoring material evidence.

The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. T. Ram Ditta* (AIR 1928 PC 172), the phrase 'substantial question of law' as it was employed in the last clause of the then existing Section 100 (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In *Sri Chunilal's case* (supra), the Constitution Bench expressed agreement with the following view taken by a full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* (AIR 1951 Mad. 969): "When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a

substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law."

To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involved in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See :Santosh Hazari v. Purushottam Tiwari (deceased) by Lrs. [(2001) 3 SCC 179].

PRINCIPLES RELATING TO SECTION 100 CPC

Kashmir Singh vs Harnam Singh & Anr on 3 March, 2008**Bench: Dr. Arijit Pasayat, P. Sathasivam, Aftab Alam** (i) An

inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no

evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

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Court in Radha Amma & Another v. C. Balakrishnan Nair & Others (2006) 8 SCC 546 dealing with marumakkathayam law. The court observed as under: "12. So far as the first submission is concerned it is not disputed before us that the question as to whether those items, namely, Items 8 to 16 belonged to the puthravakasam thavazhi, never arose for consideration in the suit or in the appeal. Defendant 2 never raised such a plea. No such issue was framed. Neither any evidence was recorded on this aspect of the matter, nor were the courts called upon to record a finding on that question. This position is not disputed by the counsel appearing for the respondents. If such be the legal and factual position, we find no justification for the High Court to interfere in appeal and modify the decree of the courts below on a question which did not arise for its consideration.... "

Similarly, in the instant case, the High Court set aside the concurrent findings of fact of the courts below on the ground that

the parties to the suit being persons residing in Kollam district and the property over which they claim right also being situated in Kollam district, they were following misravazhi system of inheritance which was essentially the principles of marumakkathayam system of inheritance. This was not the case of either of the parties. No documents were filed. No evidence was led. No issues were framed by the trial court. Therefore, the High Court was clearly in error in setting aside the concurrent findings of fact on virtually non-existent material. According to the appellants, the impugned judgment is liable to be set aside and the findings of the trial court and as affirmed by the first appellate court are liable to be restored.

In Gurdev Kaur and Others v. Kaki and Others (2007) 1 SCC 546 in which one of us (Bhandari, J.) was party to that judgment crystallized the entire legal position but unfortunately even thereafter in the number of cases it has come to our notice that the law declared by this court is not followed in a large number of cases by the High Courts. Once again we are making serious endeavour to recapitulate the legal position with the fond hope that the High Courts would keep in mind the legal position before interfering in a case of concurrent findings of facts arrived at by the trial court and upheld by the first appellate court.

CASES DECIDED BY THE PRIVY COUNCIL AND SUPREME COURT WOULD REVEAL TRUE IMPORT, SCOPE AND AMBIT OF SECTION 100 C.P.C.

The Privy Council, in Luchman v. Puna [(1889) 16 Calcutta 753 (P.C.)], observed that a second appeal can lie only on one or the other grounds specified in the present section.

The Privy Council, in another case Pratap Chunder v. Mohandranath [(1890) ILR 17 Calcutta 291 (P.C.)], the limitation as to the power of the court imposed by sections 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first appellate court upon a matter of fact.

In Durga Chowdharani v. Jawahar Singh (1891) 18 Cal 23 (PC), the Privy Council held that the High Court had no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross or inexcusable the error may seem to be. The clear declaration of law was made in the said judgment as early as in 1891. This judgment was followed in the case of Ramratan Shukul v. Mussumat Nandu (1892) 19 Cal 249 (252) (PC) and many others. The court observed: "It has now been conclusively settled that the third court...cannot entertain an appeal upon question as to the soundness of findings of fact by the second court, if there is evidence to be considered, the decision of the second court, however unsatisfactory it might be if examined, must stand final."

In the case of Ram Gopal v. Shakshaton [(1893) ILR 20 Calcutta 93 (P.C.)], the court emphasized that a court of second

appeal is not competent to entertain questions as to the soundness of a finding of facts by the courts below.

The same principle has been reiterated in Rudr Prasad v. Baij Nath [(1893) ILR 15 Allahabad 367]. The court observed that a judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case, and if they do not, to reject the appeal summarily.

Similarly, before amendment in 1976, court also had an occasion to examine the scope of Section 100 C.P.C.. **In Deity Pattabhiramaswamy v. S. Hanymayya and Others [AIR 1959 SC 57]**, the High Court of Madras set aside the findings of the District Judge, Guntur, while deciding the second appeal. This court observed that notwithstanding the clear and authoritative pronouncement of the Privy Council on the limits and the scope of the High Court's jurisdiction under section 100, Civil Procedure Code, "some learned Judges of the High Courts are disposing of Second Appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a Judge of the High Court in excess of his jurisdiction under Section 100, Civil Procedure Code. We have, therefore, no alternative but to set aside the judgment of the High Court which had no jurisdiction to interfere in second appeal with the findings

of fact arrived at by the first appellate court based upon an appreciation of the relevant evidence.

In M. Ramappa v. M. Bojjappa [(1963) SCR 673], the Andhra Pradesh High Court interfered with the finding recorded by the Appellate Court which, in turn, had itself reversed the trial court's finding on the same question of fact. While setting aside the decree of the second Appellate Court, this court observed: "It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact, but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

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26. It may be pertinent to mention that as early as in 1890 the Judicial Committee of the Privy Council stated that there is no jurisdiction to entertain a second appeal on the ground of an

erroneous finding of fact, however, gross or inexcusable the error may seem to be and they added a note of warning that no Court in India has power to add, or enlarge, the grounds specified in Section 100 of the Code of Civil Procedure.

27. Even before the amendment, interference under Section 100 C.P.C. was limited, which has now been further curtailed, which we would be dealing in cases decided by this court after the amendment.

28. We have given reference of a large number of cases decided by the Privy Council and this court to clearly understand the ambit and scope of Section 100 before amendment.

29. The Amendment Act of 1976 has introduced drastic changes in the scope and ambit of Section 100 C.P.C. A second appeal under Section 100 C.P.C. is now confined to cases where a question of law is involved and such question must be a substantial one. Section 100, as amended, reads as under:

"100. Second Appeal:

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

CASES DECIDED AFTER 1976 AMENDMENT

In Bholaram v. Amirchand (1981) 2 SCC 414 a three- Judge Bench court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.

In Kshitish Chandra Purkait v. Santosh Kumar Purkait [(1997) 5 SCC 438], a three judge Bench court held: (a) that the High Court should be satisfied that the case involved a

substantial question of law and not mere question of law; (b) reasons for permitting the plea to be raised should also be recorded; (c) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.

Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor (1999)

2 SCC 471. The court stated that the High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of the such duly framed substantial questions of law.

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A mere look at the said provision shows that the High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned Single Judge. It is held by a catena of judgments by this court, some of them being, Kshitish Chandra Purkait v. Santosh Kumar Purkait

(1997) 5 SCC 438 and Sheel Chand v. Prakash Chand (1998) 6 SCC 683 that the judgment rendered by the High Court under Section 100 C.P.C. without following the aforesaid procedure cannot be sustained. On this short ground alone, this appeal is required to be allowed.

In Kanai Lal Garari v. Murari Ganguly (1999) 6 SCC 35 the court has observed that it is mandatory to formulate the substantial question of law while entertaining the appeal in absence of which the judgment is to be set aside. In Panchugopal Barua v. Umesh Chandra Goswami (1997) 4 SCC 713 and Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179 the court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law. These judgments have been referred to in the later judgment of K. Raj and Anr. v. Muthamma (2001) 6 SCC 279. A statement of law has been reiterated regarding the scope and interference of the court in second appeal under Section 100 of the Code of Civil Procedure.

In Ishwar Dass Jain v. Sohan Lal (2000) 1 SCC 434, court in para 10, has stated: "Now under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so."

Roop Singh v. Ram Singh (2000) 3 SCC 708, court has expressed that the jurisdiction of a High Court is confined to

appeals involving substantial question of law. Para 7 of the said judgment reads: "7. It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment...."

Santosh Hazari v. Purushottam Tiwari (deceased) by LRs. (2001) 3 SCC 179, another three-Judge Bench of court correctly delineated the scope of Section 100 C.P.C.. The court observed that an obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the court. In the said judgment, it was further mentioned that the High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. According to the court the word substantial, as qualifying "question of law", means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general

importance" as has been done in many other provisions such as Section 109 of the Code of Article 133(1) (a) of the Constitution.

In Kamti Devi (Smt.) and Anr. v. Poshi Ram (2001) 5 SCC 311

the court came to the conclusion that the finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding.

In Thiagarajan v. Sri Venugopalaswamy B. Koil [(2004) 5 SCC 762],

court has held that the High Court in its jurisdiction under Section 100 C.P.C. was not justified in interfering with the findings of fact. The court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This court in a catena of decisions held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

..... In the same case, this court observed that in a case where special leave petition was filed against a judgment of the High Court interfering with findings of fact of the lower appellate court. This court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This court further observed that the High Court in second appeal cannot substitute its own

findings on reappréciation of evidence merely on the ground that another view was possible.

This court again reminded the High Courts in **Commissioner, Hindu Religious & Charitable Endowments v. P. Shanmugama [(2005) 9 SCC 232]** that the High Court has no jurisdiction in second appeal to interfere with the finding of facts.

Court in the case of State of Kerala v. Mohd. Kunhi [(2005) 10 SCC 139] has reiterated the same principle that the High Court is not justified in interfering with the concurrent findings of fact. This court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

Madhavan Nair v. Bhaskar Pillai [(2005) 10 SCC 553], court observed that the High Court was not justified in interfering with the concurrent findings of fact. This court observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

Harjeet Singh v. Amrik Singh [(2005) 12 SCC 270], court with anguish has mentioned that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court. In this case, the findings of the trial court and the lower appellate court regarding readiness and willingness to perform their part of contract was set aside by the High Court in its

jurisdiction under Section 100 C.P.C. This court, while setting aside the judgment of the High Court, observed that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the courts below.

In the case of H. P. Pyarejan v. Dasappa [(2006) 2 SCC 496] delivered on 6.2.2006, court found serious infirmity in the judgment of the High Court. This court observed that it suffers from the vice of exercise of jurisdiction which did not vest in the High Court. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the court to interfere with the judgments of the courts below is confined to hearing of substantial questions of law. Interference with the finding of fact by the High Court is not warranted if it invokes reappreciation of evidence. This court found that the impugned judgment of the High Court was vulnerable and needed to be set aside.

Chandrika Singh (Dead) by LRS & Another v. Sarjug Singh & Another (2006) 12 SCC 49, court again reiterated legal position that the High Court under section 100 CPC has limited jurisdiction. To deal with cases having a substantial question of law, this court observed as under: "12. ... While exercising its jurisdiction under Section 100 of the Code of Civil Procedure, the High Court is required to formulate a substantial question of law in relation to a finding of fact. The High Court exercises a limited jurisdiction in that behalf. Ordinarily unless there exists a sufficient and cogent reason, the findings of fact arrived at by the courts below are binding on the High Court..."

In Chacko & Another v. Mahadevan (2007) 7 SCC 363, while dealing with the jurisdiction of sections 96 and 100 CPC, this court laid down as under: "6. It may be mentioned that in a first appeal filed under Section 96 CPC, the appellate court can go into questions of fact, whereas in a second appeal filed under Section 100 CPC the High Court cannot interfere with the findings of fact of the first appellate court, and it is confined only to questions of law."

In Bokka Subba Rao v. Kukkala Balakrishna & Others (2008) 3 SCC 99, court has clearly laid down that without formulating substantial questions of law under section 100 CPC, the High Court cannot interfere with the findings of fact. The court laid down as under: "4. ... It is now well settled by a catena of decisions of this Court that the High Court in second appeal, before allowing the same, ought to have formulated the substantial questions of law and thereafter, to decide the same on consideration of such substantial questions of law"

In Nune Prasad & Others v. Nune Ramakrishna (2008) 8 SCC 258, court laid down that the legislature has conferred a limited jurisdiction under section 100 CPC on the High Court to deal with the cases where substantial question of law is involved.

In Basayyal Mathad v. Rudrayya S. Mathad & Others (2008) 3 SCC 120, court has held that interference by the High Court

without framing substantial question of law is clearly contrary to the mandate of section 100 CPC.

In Dharam Singh v. Karnail Singh & Others, (2008) 9 SCC 759, court again crystallized the legal position in the following words: "13. The plea about proviso to Sub-section (5) of Section 100 instead of supporting the stand of the respondent rather goes against them. The proviso is applicable only when any substantial question of law has already been formulated and it empowers the High Court to hear, for reasons to be recorded, the appeal on any other substantial question of law. The expression "on any other substantial question of law" clearly shows that there must be some substantial question of law already formulated and then only another substantial question of law which was not formulated earlier can be taken up by the High Court for reasons to be recorded, if it is of the view that the case involves such question."

In Narendra Gopal Vidyarthi v. Rajat Vidyarthi, 2008 (16) SCALE 122, court laid down that the High Court would be justified to interfere under section 100 CPC only if it involves substantial question of law.

In **U.R. Virupakshaiah v. Sarvamma & Another, 2009 (1) SCALE 89**, court has once again crystallized the legal position after 1976 Amendment of the CPC. The court observed as under: "The Code of Civil Procedure was amended in the year 1976 by reason of Code of Civil Procedure (Amendment) Act, 1976. In

terms of the said amendment, it is now essential for the High Court to formulate a substantial question of law. The judgments of the trial court and the First Appellate Court can be interfered with only upon formulation of a substantial question of law..."

Municipal Committee, Hoshiarpur vs Punjab State Electricity Board & ... on 19 October, 2010 Bench: P. Sathasivam, B.S. Chauhan

In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors., AIR 1999 SC 2213, Court held as under:- "It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before an appeal can be maintained and no Court has the power to add to or enlarge those grounds. The appeal cannot be decided on merit on merely equitable grounds."

In Vijay Prakash D. Mehta & Jawahar D. Mehta v. Collector of Customs (Preventive), Bombay, AIR 1988 SC 2010, Court held as under:- "Right to appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial or quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grantThe purpose of the Section is to

act in terrorem to make the people comply with the provisions of law."

Court in Anant Mills Co. Ltd. v. State of Gujarat, AIR 1975 SC 1234; and *Shyam Kishore & Ors. v. Municipal Corporation of Delhi & Anr.*, AIR 1992 SC 2279. A Constitution Bench of this court in *Nandlal & Anr. v. State of Haryana*, AIR 1980 SC 2097, held that the "right of appeal is a creature of statute and there is no reason why the legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory".

In Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors., (1999) 4 SCC 468, Court held that the right of appeal though statutory, can be conditional/qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided for under the statute and when a law authorises filing of an appeal, it can impose conditions as well.

Thus, it is evident from the above that the right to appeal is a creation of Statute and it cannot be created by acquiescence of the parties or by the order of the Court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a Court or Authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full

compliance of the conditions mentioned in the provision that creates it. Therefore, the Court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The Court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal, on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine-qua-non for the exercise of jurisdiction under the provisions of Section 100 C.P.C. It is the obligation on the Court to further the clear intent of the Legislature and not to frustrate it by ignoring the same. (Vide: Santosh Hazari v. Purshottam Tiwari (dead) by Lrs., AIR 2001 SC 965; Sarjas Rai & Ors. v. Bakshi Inderjeet Singh, (2005) 1 SCC 598; Manicka Poosali (Deceased by L.Rs.) & Ors. v. Anjalai Ammal & Anr., AIR 2005 SC 1777; Mst. Sugani v. Rameshwar Das & Anr., AIR 2006 SC 2172; Hero Vinoth (Minor) v. Seshammal, AIR 2006 SC 2234; P. Chandrasekharan & Ors. v. S. Kanakarajan & Ors., (2007) 5 SCC 669; Kashmir Singh v. Harnam Singh & Anr., AIR 2008 SC 1749; V. Ramaswamy v. Ramachandran & Anr., (2009) 14 SCC 216; and Bhag Singh v. Jaskirat Singh & Ors., (2010) 2 SCC 250).

In Mahindra & Mahindra Ltd. v. Union of India & Anr., AIR 1979 SC 798, Court observed: "..... It is not every question of law that could be permitted to be raised in the second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in Sub-section (5) of Section 100. Under the proviso, the Court should be 'satisfied' that the case involves a substantial question of law and not a mere question of law. The reason for permitting the substantial question of law to be raised, should be recorded by the Court. It is implicit therefrom that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same. It is not any legal plea that would be alleged at a stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded."

In Madamanchi Ramappa & Anr. v. Muthaluru Bojjappa, AIR 1963 SC 1633, this Court observed: ".....Therefore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and

considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

In Jai Singh v. Shakuntala, AIR 2002 SC 1428, this Court held as under: "...it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible - it is a rarity rather than a regularity and thus it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

Court in Leela Soni & Ors. v. Rajesh Goyal & Ors., (2001) 7 SCC 494, observed as under:

"20. There can be no doubt that the jurisdiction of the High Court under Section 100 of the Code of Civil Procedure (CPC) is confined to the framing of substantial questions of law involved in the second appeal and to decide the same. Section 101 CPC provides that no second appeal shall lie except on the grounds mentioned in Section 100 CPC. Thus it is clear that no second appeal can be entertained by the High Court on questions of fact, much less can it interfere in the findings of fact recorded by the

lower appellate court. This is so, not only when it is possible for the High Court to take a different view of the matter but also when the High Court finds that conclusions on questions of fact recorded by the first appellate court are erroneous.

21. It will be apt to refer to Section 103 CPC which enables the High Court to determine the issues of fact:

xx xx xx

22. The section, noted above, authorises the High Court to determine any issue which is necessary for the disposal of the second appeal provided the evidence on record is sufficient, in any of the following two situations: (1) when that issue has not been determined both by the trial court as well as the lower appellate court or by the lower appellate court; or (2) when both the trial court as well as the appellate court or the lower appellate court have wrongly determined any issue on a substantial question of law which can properly be the subject-matter of second appeal under Section 100 CPC."

In Jadu Gopal Chakravarty v. Pannalal Bhowmick & Ors., AIR 1978 SC 1329, the question arose as to whether the compromise decree had been obtained by fraud. This Court held that though it is a question of fact, but because none of the courts below had pointedly addressed the question of whether the compromise in the case was obtained by perpetrating fraud on the court, the High Court was justified in exercising its powers under Section 103 C.P.C. to go into the question. (See also *Achintya Kumar Saha v. M/s Nanee Printers & Ors.*, AIR 2004 SC 1591)

In Shri Bhagwan Sharma v. Smt. Bani Ghosh, AIR 1993 SC 398, Court held that in case the High Court exercises its jurisdiction under Section 103 C.P.C., in view of the fact that the findings of fact recorded by the courts below stood vitiated on account of non-consideration of additional evidence of a vital nature, the Court may itself finally decide the case in accordance with Section 103(b) C.P.C. and the Court must hear the parties fully with reference to the entire evidence on record with relevance to the question after giving notice to all the parties. The Court further held as under: ".....The grounds which may be available in support of a plea that the finding of fact by the court below is vitiated in law, does not by itself lead to the further conclusion that a contrary finding has to be finally arrived at on the disputed issue. On a re-appraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be pre-judged, as has been done in the impugned judgment..".

POWERS UNDER SECTION 103 CPC

Municipal Committee, Hoshiarpur vs Punjab State Electricity Board & ... on 19 October, 2010 Bench: P. Sathasivam, B.S. Chauhan

Powers under Section 103 C.P.C. can be exercised by the High Court only if the core issue involved in the case is not decided by the trial court or the appellate court and the relevant material is available on record to adjudicate upon the said issue.

(See: Haryana State Electronics Development Corporation Ltd. & Ors. v. Seema Sharma & Ors., (2009) 7 SCC 311)

22. Before powers under Section 103 C.P.C. can be exercised by the High Court in a second appeal, the following conditions must be fulfilled:

- (i) Determination of an issue must be necessary for the disposal of appeal;
- (ii) The evidence on record must be sufficient to decide such issue; and
- (iii) (a) Such issue should not have been determined either by the trial court, or by the appellate court or by both; or
(b) such issue should have been wrongly determined either by trial court, or by the appellate court, or by both by reason of a decision on substantial question of law.

If the above conditions are not fulfilled, the High Court cannot exercise its powers under Section 103 CPC.

In Kulwant Kaur & Ors. v. Gurdial Singh Mann (dead) by LRs. & Ors., AIR 2001 SC 1273, Court observed as under :
"Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is

an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication -- what is required is a categorical finding on the part of the High Court as to perversity.

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."

There is no prohibition on entertaining a second appeal even on a question of fact provided the Court is satisfied that the findings of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. (Vide: Jagdish Singh v. Natthu Singh, AIR 1992 SC 1604; Karnataka Board of Wakf v. Anjuman- E-Ismail Madris- Un-Niswan, AIR 1999 SC 3067; and Dinesh Kumar v. Yusuf Ali, AIR 2010 SC 2679).

If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide: *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*, AIR 2010 SC 2685)

The principles of natural justice cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case. Thus, they cannot be put in a strait-jacket formula. "Natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential procedural propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of." The two rules of natural justice, namely, *nemo iudex in causa sua*, and *audi alteram partem* now have a definite meaning and connotation in law and their contents and implications are well understood and firmly established; they are nonetheless non-

statutory. The court has to determine whether the observance of the principles of natural justice was necessary for a just decision in the facts of the particular case. (Vide: *The Chairman, Board of Mining Examination and Chief Inspector of Mines & Anr. v. Ramjee*, AIR 1977 SC 965; *Union of India & Anr. v. Tulsiram Patel*, AIR 1985 SC 1416; and *Managing Director, ECIL, Hyderabad v. B. Karunakar*, AIR 1994 SC 1074).

There may be cases where on admitted and undisputed facts, only one conclusion is possible. In such an eventuality, the application of the principles of natural justice would be a futile exercise and an empty formality. (Vide: *State of U.P. v. Om Prakash Gupta*, AIR 1970 SC 679; *S.L. Kapoor v. Jagmohan & Ors.*, AIR 1981 SC 136; and *U.P. Junior Doctors' Action Committee v. Dr. B. Sheetal Nandwani & Ors.*, AIR 1991 SC 909).

Thus, it is evident that Section 103 C.P.C. is not an exception to Section 100 C.P.C. nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing Section 103 C.P.C. in service, the High Court has to record a finding that it had to exercise such power, because it found that finding(s) of fact recorded by the court(s) below stood vitiated because of perversity. More so, such power can be exercised only in exceptional circumstances and with circumspection, where the core question involved in the case has not been decided by the court(s) below.

There is no prohibition on entertaining a second appeal even on a question of fact provided the Court is satisfied that the findings of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an

erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. (Vide: Jagdish Singh v. Natthu Singh, AIR 1992 SC 1604; Karnataka Board of Wakf v. Anjuman- E-Ismail Madris- Un-Niswan, AIR 1999 SC 3067; and Dinesh Kumar v. Yusuf Ali, AIR 2010 SC 2679).

The Hon'ble Apex Court in the case of Gayathri Vs. M. Girish reported in MANU/KA/2809/2016 : ILR 2016 KAR 3341 has categorically held that the misplaced sympathy and indulgence by the appellate and revisional courts would compound the malady of delay, further encouraging the civil disputes to drag on and on, which would be against the concept of speedy disposal of the civil litigation. In the light of this judgment, the plea made by the appellants to remand the case for adducing any evidence also does not inspire any credence.

In S.R. Tiwari v. Union of India MANU/SC/0566/2013 : (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Administration, Through Secretary (Labour) and Ors. MANU/SC/0285/1984 : (1984) 4 SCC 635, it was held at paragraph-30: 30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible

material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide *Rajinder Kumar Kindra v. Delhi Admn.* [MANU/SC/0285/1984 : (1984) 4 SCC 635: 1985 SCC (L and S) 131 : AIR 1984 SC 1805], *Kuldeep Singh v. Commr. of Police* [MANU/SC/0793/1998 : (1999) 2 SCC 10 : 1999 SCC (L and S) 429 : AIR 1999 SC 677], *Gamini Bala Koteswara Rao v. State of A.P.* [MANU/SC/1669/2009 : (2009) 10 SCC 636 : (2010) 1 SCC (Cri.) 372 : AIR 2010 SC 589] and *Babu v. State of Kerala* [MANU/SC/0580/2010 : (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179].)

In Kulwant Kaur and Ors. v. Gurdial Singh Mann (Dead) by L.Rs. MANU/SC/0182/2001 : (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote paragraph-34: 34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that

while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication--what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:

Damodar Lal vs. Sohan Devi and Ors: MANU/SC/0001/2016

103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or

(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100.

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law.

We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with.

In Gurvachan Kaur and Ors. v. Salikram (Dead) Through L.Rs. MANU/SC/1244/2009 : (2010) 15 SCC 530, at paragraph-10, this principle has been reiterated: 10. It is settled law that in exercise of power Under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the Plaintiff and the Defendant and default committed by the latter in payment of rent.

In Krishnan v. Backiam and Anr. MANU/SC/7893/2007 : (2007) 12 SCC 190, it has been held at paragraph-11 that: 11. It may be mentioned that the first appellate court Under Section

96 Code of Civil Procedure is the last court of facts. The High Court in second appeal Under Section 100 Code of Civil Procedure cannot interfere with the findings of fact recorded by the first appellate court Under Section 96 Code of Civil Procedure. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect. ...

Balwinder Singh vs. National Fertilizers Ltd.: **MANU/SC/0595/2014 - Court in Umerkhan v. Bismillabi alias Babulal Shaikh MANU/SC/0864/2011 : (2011) 9 SCC 684.** In the said case, this Court held as follows: 11. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court Under Section 100 is not akin to the appellate jurisdiction Under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is,

however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction Under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question.

12. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where the High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position.

18. Similar was the view of this Court in *Hardeep Kaur v. Malkiat Kaur* MANU/SC/0216/2012 : (2012) 4 SCC 344. This Court held that the High Court is required to formulate substantial question of law involved in the second appeal at the initial stage itself if it is satisfied that the matter deserves to be admitted and the second appeal has to be heard and decided on such substantial question of law.

Supreme Court in the case of Kulwant Kaur v. Gurdial Singh Mann, MANU/SC/0182/2001 : [2001]2SCR525 , wherein in

the context of Section 100 of the Code of Civil Procedure, it has been held that (page 278 of [2001] 4 SCC 278) : "... while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-a-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication--what is required is a categorical finding on the part of the High Court as to perversity . . .",

A PERSON WHO IS NOT PARTY CAN APPEAL PROVIDED HE OBTAINS LEAVE OF COURT SHOWING WHAT INTEREST HE HAS IN THE PROPERTY

In Shivaraya v. Siddamma. AIR 1963 Mys 127 while considering the question as to whether a person who is not a party to the proceeding can prefer an appeal, it is held that leave to a person to appeal from a decree or order in a proceeding to which he is not a party shall not ordinarily be granted unless he establishes that he has an interest which is affected by the order or decree from which he proposes to appeal. It is also further held that the question as to whether leave should or should not be granted depends upon the facts of each case and it is for the

appellate court to decide whether the case before it is a fit one for the grant of such leave. This decision is approved in *The State of Punjab v. Amarsingh*, AIR 1974 SC 904 at para 84

PECUNIARY JURISDICTION OF APPELLATE COURT

THE HON'BLE MR.JUSTICE MOHAN .M. SHANTANAGOUDAR
Of HIGH COURT OF KARNATAKA, in the case of Kalpana vs
Sanjay (WRIT PETITION NO.100755/2014) Decided on 20
November, 2014 held that “What is to be seen is the valuation as made by the plaintiff before the trial Court. The decretal amount need not be taken into consideration while fixing the jurisdiction of the appellate Court. The appeals will normally lie before the District Court, inasmuch as the valuation as made out before the trial Court was Rs.55,000/-. Merely because the decretal amount is higher than Rs.10,00,000/-, the District Court does not lose its jurisdiction.”

ENTIRE APPEAL ABATES IF ONE OF DEAD LRS ARE NOT BROUGHT ON RECORD

Poorna Singh and Ors. vs. Rukkubai and Ors.:
MANU/KA/1309/2018 - If the cause of action is joint and inseparable, the entire suit or the appeal abates if the legal representatives of the deceased party is not brought on record. This is not so if the cause of action is separable and not joint. In a suit for partition of joint family property, the cause of action is inseparable. It is for this reason that in a suit for partition all

the members who are entitled to partition must be made parties. Consequent to death of defendants 2 and 3 during the pendency of the first appeal, if their legal representatives were not brought on record, it only resulted in abatement of the entire appeal. The Supreme Court in the case of Rameshwar Prasad (MANU/SC/0203/1963 : AIR 1963 SC 1901) (supra) has reiterated the position that was taken by it earlier in the case of State of Punjab v. Nath Ram [MANU/SC/0019/1961 : AIR 1962 SC 89]. The said principle is as below:-- "15.The abatement of an appeal means not only that the decree between the appellant and the deceased respondent had become final, but also, as a necessary corollary, that the appellate Court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken".

CROSS OBJECTIONS IN APPEAL NOT MANDATORY

Apex Court in case of Ravindra Kumar Vs. State of Assam
MANU/SC/0561/1999 : AIR 1999 SC 3571, wherein it has been held inter alia that the respondents in appeal can, without filing cross objection, attack the adverse findings upon which a decree in part has been passed against the respondents and that filing of cross-objection after the 1976 Amendment is purely

optional and not mandatory. In the said decision, the appellants/plaintiffs had filed a suit for damages for malicious prosecution against respondents/defendants. A plea of malicious prosecution where damages are sought for pecuniary loss and also damages for non-pecuniary loss was raised. It was held by the High Court that there was malice etc., on the part of the defendants and granted a decree for pecuniary losses, but did not grant any decree for non-pecuniary losses, as no proper evidence was adduced in that behalf. When appealed in the Hon'ble Supreme Court for damages seeking a decree for non pecuniary loss, it was held that, the respondent/defendant, even though has not filed any appeal or cross-objection in regard to the adverse finding as to malice and against the decree for pecuniary loss in-respect of B and C schedules, can attack the finding as to malice and support the decree of dismissal of suit so far as the A schedule non-pecuniary losses are concerned. It was held that filing of cross-objection against adverse finding was not necessary. The decision therein was concerned with the adverse finding and not challenge to the decree passed and hence has no application to the instant case.

Hon'ble Supreme Court in the case of **Panna Lal v. State of Bombay and Ors.** reported in **MANU/SC/0240/1963 : AIR 1963 SC 1516** with regard to the scope of the provisions contained under Rules 22 and 33 of Order 41 Code of Civil Procedure and the power of the Appellate Court to grant relief. That was a case wherein it was held that, Rule 33 of Order 41 was held to be applicable not only between the appellant and the

respondent but also as between a respondent and a respondent and it was held that, it empowers the Appellate Court not only to give or refuse relief to the appellant by allowing or dismissing the appeal that also to give such other relief to any of the respondents as the case may require.

Hon'ble Supreme Court in the case of **K. Muthuswami Gounder v. N. Palaniappa Gounder, reported in MANU/SC/0559/1998 : AIR 1998 SC 3118** with regard to the scope of the powers of the Appellate Court under Rule 33 of Order 41. In the said decision, it was held as follows: 12. Order XLI, Rule 33 enables the Appellate Court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal. The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the Court and the question raised properly arises out of the judgment of the lower Court and in that event the Appellate Court could consider any objection to any part of the order or decree of the Court and set it right. We are fortified in this view by the decision of this Court in AIR 1988 SC 54. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order LXI. Rule 33, Code of Civil Procedure and each case must depend upon its own facts. The rule enables the Appellate Court to pass any order/decreed which ought to have been passed. The general principle is that a decree is binding on the parties to it

until it is set aside in appropriate proceedings, ordinarily the Appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal and this rule holds good notwithstanding Order XLI, Rule 33, Code of Civil Procedure. However, in exceptional cases the rule enables the Appellate Court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal. The power though discretionary should not be declined to be exercised merely on the ground that the party has not filed any appeals.

S. Nazeer Ahmed vs. State Bank of Mysore and Ors. AIR 2007 SC 989 : MANU/SC/7017/2007 Order XLI Rule 33 enables the appellate court to pass any decree that ought to have been passed by the trial court or grant any further decree as the case may require and the power could be exercised notwithstanding that the appeal was only against a part of the decree and could even be exercised in favour of the respondents, though the respondents might not have filed any appeal or objection against what has been decreed.

IN WHAT CASES CROSS OBJECTIONS NECESSARY

In the case of **Banarsi and Ors. v. Ram Phal, reported in MANU/SC/0147/2003 : AIR 2003 SC 1989**, wherein the appeal had arisen out of a suit for specific performance, the Hon'ble Supreme Court has held that, if the impugned decree is partly in favour of the appellant and partly in favour of the respondent, it

was for the respondent to file an appeal or take cross-objection against that part of the decree which is against him, if he seeks to get rid of the same though that part of the decree which is in his favour, he is entitled to support without taking any cross-objection and that there is no change of law, post amendment to, after the amended Act 104 of 1976 with effect from 1.2.1977 to Code of Civil Procedure. Considering a case relating to suit for specific performance, wherein either the main relief or alternative relief can be granted and the effect of not challenging one of the reliefs to which suit is decreed, either by filing an appeal or cross-objection, it was held as follows:12. The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross-objection failing which the decree to the extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage. The law continues to remain so post-1976 amendment. In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the Court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or any other relief including the relief of refund shall be granted by the Court unless it has been specifically claimed in the plaint by the plaintiff. Certainly the relief of specific performance is a larger relief for the plaintiff and more onerous to the defendant

compared with the relief for compensation or refund of money. The relief of compensation or refund of money is a relief smaller than the relief of specific performance. A plaintiff who files a suit for specific performance claiming compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right, to file an appeal against the original decree if the relief of specific performance is refused and other relief is granted. The plaintiff would be a person aggrieved by the decree in spite of one of the alternative reliefs having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent. It follows as a necessary corollary from the abovesaid statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross-objection.

13. We are therefore, of the opinion that in the absence of cross-appeal preferred or cross-objection taken by the plaintiff-respondent the First Appellate Court did not have jurisdiction to

modify the decree in the manner in which it has done. Within the scope of appeals preferred by the appellants the First Appellate Court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. What the First Appellate Court has done is not only to set aside the decree to the extent to which it was in favour of the appellants but also granted an absolute and out and out decree for specific performance of agreement to sell which is to the prejudice of the appellants and to the advantage of the respondent who has neither filed an appeal nor taken any cross-objection.

15. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate Court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs

prayed for one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate Court exercising power under Rule 33 of Order 41.....

21. In the case before us, the Trial Court found the defendant not entitled to decree for specific performance and found him entitled only for money decree. In addition, a conditional decree was also passed directing execution of sale deed if only the defendant defaulted any paying or depositing the money within two months. Thus to the extent of specific performance, it was not a decree outright; it was a conditional decree. Rather, the latter part of the decree was a direction in terrorem so as to secure compliance by the appellant of the money part of the decree in the scheduled time frame. In the event of the appellant having made the payment within a period of two months, the respondent would not be, and would never have been, entitled to the relief of specific performance. The latter decree is not inseparably connected with the former decree. The two reliefs are surely separable from each other and one can exist without the other. Nothing prevented the respondent from filing his own appeal or taking cross-objection against that part of the decree which refused straightway a decree for specific performance in his favour based on the finding of comparative hardship recorded earlier in the judgment. The dismissal of appeals filed by the appellant was not resulting in any inconsistent, iniquitous, contradictory or unworkable decree

coming into existence so as to warrant exercise of power under Rule 33 of Order 41. It was not a case of interference with decree having been so interfered with as to call for adjustment of equities between respondents inter se. By his failure to prefer an appeal or to take cross-objection the respondent has allowed the part of the Trial Court's decree to achieve a finality which was adverse to him.

22. For the foregoing reasons we are of the opinion that the first Appellate Court ought not to have, while dismissing the appeals filed by the defendant-appellants before it, modified the decree in favour of the respondent before it in the absence of cross-appeal or cross-objection. The interference by the first Appellate Court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of law committed by the first Appellate Court.

SCOPE OF FILING REVIEW PETITION

The Hon'ble Apex Court in the case of Kamlesh Verma Vs. Mayawati and Others reported in MANU/SC/0810/2013 : (2013) 8 SCC 320, has laid down the principles in respect of maintainability and non-maintainability at paragraph Nos. 19 and 20, which are as under:

"19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In review jurisdiction, mere disagreement with the view of

the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the principles 20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1 When the review will be maintainable: (sufficient reasons provided under Order XLVII, Rule 1(1) of the Code of Civil Procedure, 1908)

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;
- (ii) Mistake or error apparent on the face of the record;
- (iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in *Chhajju Ram v. Neki* (1922) 24 BOMLR 1238 and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius* AIR 1954 SC 526, to **mean "a reason sufficient on grounds at least analogous to those specified in the rule"**. The same principles have been reiterated in *Union of India v. Sandur Manganese & Iron Ores Ltd*, 2013(8) SCC 337.

20.2. When the review will not be maintainable:

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
- (ii) Minor mistakes of inconsequential import.

- (iii) Review proceedings cannot be equated with the original hearing of the case.
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.
- (v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.
- (vi) The mere possibility of two views on the subject cannot be a ground for review.
- (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.
- (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.
- (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived".

WHEN SECOND APPEAL CAN BE FILED ON QUESTION OF FACT

Union of India (UOI) vs. Ibrahim Uddin and Ors. 2012(8) SCC 148 : MANU/SC/0561/2012 - There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse. (Vide: Jagdish Singh v. Nathu Singh

MANU/SC/0313/1992 : AIR 1992 SC 1604; Smt. Prativa Devi (Smt.) v. T.V. Krishnan, MANU/SC/0811/1987 : (1996) 5 SCC 353; Satya Gupta (Smt.) @ Madhu Gupta v. Brijesh Kumar, MANU/SC/0513/1998 : (1998) 6 SCC 423; Ragavendra Kumar v. Firm Prem Machinery & Company MANU/SC/0010/2000 : AIR 2000 SC 534; Molar Mal (dead) through Lrs. v. Kay Iron Works Pvt. Ltd. MANU/SC/0179/2000 : AIR 2000 SC 1261; Bharatha Matha and Anr. v. R. Vijaya Renganathan and Ors. MANU/SC/0400/2010 : AIR 2010 SC 2685; and Dinesh Kumar v. Yusuf Ali, MANU/SC/0407/2010 : (2010) 12 SCC 740).

In Jai Singh v. Shakuntala MANU/SC/0187/2002 : AIR 2002 SC 1428, Court held that it is permissible to interfere even on question of fact but it may be only in "very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible it is a rarity rather than a regularity and thus in fine it can thus be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection.

Apex Court in the case of **Kashmir Singh v. Harnam Singh reported in AIR 2008 SCW 2417**, and the law laid down by the Apex Court in the said case as regards interference is as under:
(A) As a general rule, the High Court will not interfere with the concurrent findings of facts unless the case comes within the well recognized exceptions viz. (i) the courts below have ignored the material evidence or acted on no evidence; (ii) the courts have

drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

CHANGE OF LAW WHEN APPEAL PENDING

Constitutional Bench of Supreme Court again in **Shyam Sunder v. Ram Kumar, MANU/SC/0405 /2001 : (2001) 8 SCC 24**, held that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of the suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit.

In **VKNM Vocational Higher Secondary School v. State of Kerala, MANU/SC/0076/2016 : (2016) 4 SCC 216**, held that when we make a comprehensive reference to the above principles, it can be said that for the legal pursuit of a remedy it must be shown that the various stages of such remedy are formed into a chain or rather as series of it, which are connected by an intrinsic unity which can be called as one proceeding, that such vested right, if any, should have its origin in a proceeding which was instituted

on such right having been crystallised at the time of its origin itself, in which event all future claims on that basis to be pursued would get preserved till the said right is to be ultimately examined. In the event of such preservation of the future remedy having come into existence and got crystallised, that would date back to the date of origin when the so-called vested right commenced, that then and then only it can be held that the said right became a vested right and it is not defeated by the law that prevails at the date of its decision or at the date of subsequent filing of the claim. One other fundamental principle laid down which is to be borne in mind is that even such a vested right can also be taken away by a subsequent enactment if such subsequent enactment specifically provides by express words or by necessary intendment. In other words, in the event of the extinction of any such right by express provision in the subsequent enactment, the same would lose its value.

Adv - Sridhara babu N

CHAPTER

PARTITION - HINDU LAW - JOINT FAMILY - COPARCENARY

SUIT FOR PARTIAL PARTITION NOT MAINTAINABLE

In the case of **Kenchegowda [since deceased] by Legal Representatives v. Siddegowda Alias Motegowda [(1994(4) SCC 294)]**, it is held that unless all the joint family properties are made the subject matter of the suit, suit for partial partition is not maintainable.

PARTITION DEED AND REGISTRATION

In **Nandi Bai v. Gita Bai Kom Rama Gunge, AIR 1958 SC 706**, it has been held by Court that though partition amongst the Hindus may be effected orally but if the parties reduces it in writing to a formal document which is intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted in partition and thus the document would be required to be compulsorily registered under Section 17(1)(b) of the Registration Act. However, if the document did not evidence any partition by metes and bounds, it would be outside the purview of Section 17(1)(b) of the Indian Registration Act. This decision was followed

in *Shiromani and Ors. v. Hem Kumar and Ors.*, AIR 1968 SC 1299 and *Roshan Singh v. Zile Singh*, AIR 1988 SC.

In **Sk. Sattar Sk. Mohd. Choudhari v. Gundappa Amabadas Bukate, 1996 (6) SCC 373**, after analysing the judgments, referred to above, Court observed: "Partition, specially among the coparceners, would be a "Transfer" for purposes of Registration Act 1908 or not has been considered in *Nani Bai v. Gita Bai Kom Rama Gunge*, AIR 1958 SC 706 and it has been held that though a partition may be effected orally, if the parties reduce the transaction to a formal document which was intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted (by partition) and thus the document would all within the mischief of Section 17(1)(b) of the Registration Act under which the document is compulsorily registerable. If, however, that document did not evidence any partition by metes and bounds, it would be outside the purview of that section. This decision has since been followed in *Siromani v. Hemkumar and Roshan Singh v. Zile singh*, (AIR 1988 SC 881)."

LEGAL POSITION OF PARTITION DEED AS TO ITS REGISTRATION

- (I) A family arrangement can be made orally.
- (II) If made orally, there being no document, no question of registration arises.

(III) If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act.

(IV) Whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon a consideration of the nature of phraseology of the writing and the circumstances in which and the purpose with which it was written.

(V) However, a document in the nature of a Memorandum, evidencing a family arrangement already entered into and had been prepared as a record of what had been agreed upon, in order that there are no hazy notions in future, it need not be stamped or registered.

(VI) Only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

(VII) If the family arrangement is stamped but not registered, it can be looked into for collateral purposes.

(VIII) Whether the purpose is a collateral purpose, is a question of fact depending upon facts and circumstances of each case. A

person can not claim a right or title to a property under the said document, which is being looked into only for collateral purposes.

(IX) A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in Section 35 of the Indian Stamp Act.?

SUIT FOR PARTITION OF JOINT FAMILY NOT MAINTAINABLE IF NOTIONAL PARTITION HAS ENSUED

Hon'ble Supreme Court in the case of **Uttam - vs- Saubhag Singh and others reported in (2016)4 SCC 68** The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:-

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of

the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

Applying the law to the facts of this case, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act. This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, and the other coparceners and his widow held the property as tenants in common and not as joint tenants. This being the case, on the date of the birth of the appellant in 1977 the said

ancestral property, not being joint family property, the suit for partition of such property would not be maintainable.

PURCHASER NOT FILING COMPREHENSIVE SUIT FOR PARTITION BUT FILING SUIT FOR PARTIAL PARTITION SAYING PURCHASED PORTION OF SHARE BELONGING TO SELLER NOT MAINTAINABLE 2013 KARHC

Sri. Vishwaraj and Ors. etc. etc. vs. Sri. B.M. Byrappa and Ors. etc. etc.: MANU/KA/0342/2013 Plaintiff having stepped into shoes of joint family member and they having not chosen to file comprehensive suit for partition of joint family properties and attempting to seek their right enforced on ground that they had purchased a portion of a share belonging to a member of joint family, such suit for partial partition would not be maintainable since even partition which he seeks was based on equity and not as of right.

RIGHT OF WIDOW AND MOTHER TO FILE SUIT FOR PARTITION

Honourable Supreme Court in Gurupad Khandappa Magdum vs. Hirabai Khandappa Magdum and ors. (1978) 3 SCC 833, it was held that a right having been given to a widow or a mother under the Hindu Succession Act, 1956, she could not be told that though she had a right to get a share, a suit for recovery of the share of her deceased husband could not be filed.

Ramnath Sao @ Ram Nath Sahu (since deceased) Thr. L.Rs. and ors. vs. Goberdhan Sao (since deceased) Thr. LRs. And ors. JT 2017 (3) SC 627, the Honourable Supreme Court after referring to its earlier decision in Gurupad Khandappa Magdum (surpa) reiterated the legal position that the share of the widow of a Hindu male co- parcener by virtue of notional partition stands recognized. Similarly in Cherotte Sugathan (D) by L.R.s and ors. vs. Cherotte Bharathi and ors. AIR 2008 SC 1467 it was held that a widow inherits the property of her husband on his death and would become its absolute owner. Subsequent remarriage would not divest her of the property in view of Section 14 of that Act. It is therefore clear that Shantabai had a legal right to file a suit for partition and separate possession as regards the share of her husband in the suit properties.

MINOR INTEREST IF NOT PROTECTED CAN BE RE-OPENED

If minor interest is not protected, the reopening of the minors rights can be done at any stage in view of the dictum of the Hon'ble Supreme Court in the case of RATNAM CHETTIAR AND OTHERS .vs. S.M. KUPPUSWAMI CHETTIAR AND OTHERS reported in AIR 1976 SC 1.

COPARCENERY OR ABSOLUTE INHERITANCE

In Additional Commissioner of Income vs. P.L. Karuppan Chettiar reported in AIR 1979 Madras (1) a Full Bench of

Madras High Court after revisiting the law as well as the effect of Section-4, concluded that the property allotted to a Hindu male in a partition between him and his father or the property that devolves on him, as coparcener under Section-6 will be treated as ancestral property vis a vis his son. In so far as the property i.e. inherited by a male Hindu under Section-8, will be held by him as an absolute owner and that his son or sons will not get a right by birth over the same. In effect, the Full Bench, noticed the difference between a devolution of ancestral property under Section-6 and inheritance under Section-8.

In **Commissioner of Wealth Tax vs. Chander Sen etc. reported in AIR 1986 SC 1753** the Hon'ble Supreme Court after referring to the Madras High Court Full Bench Judgement and agreed with the same, and observed as follows: There is no dispute among the commentators on Hindu Law nor in the decisions of the Court that under the Hindu Law as it is, the son would inherit the same as karta of his own family. But the question, is, what is the effect of section 8 of the Hindu Succession Act, 1956? The Hindu Succession Act, 1956 lays down the general rules of succession in the case of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and class I of the Schedule provides that if there is a male heir of class I then upon the heirs mentioned in class I of the Schedule. The heirs mentioned in class I of the Schedule are son, daughter etc. including the son of a pre-deceased son but does not include specifically the grandson, being a son of a son living. Therefore, the short question, is, when the son as heir of class I of the

Schedule inherits the property, does he do so in his individual capacity or does he do so as karta of his own undivided family?

COPARCENARY PROPERTY

Coparcenary property, as is observed by their Lordships in **Rohit Chauhan vs Surinder Singh (2013) 9 SCC 419**, means : - "... In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener."

REQUIREMENTS WHEN COURT HAS TO FORM AN OPINION AS TO RELATIONSHIP OF ONE PERSON TO ANOTHER

The essential requirements as per the decision of the Apex Court in the case of Dalgobinda Paricha v. Nimai Charan Misra reported in MANU/SC/0188/1959 : AIR 1959 SC 914 are a) the Court has to form an opinion as to the relationship of one person to another b) the opinion expressed by conduct as to the existence of such relationship is relevant fact and c) but the person whose opinion is relevant must be one who as a member of the family or otherwise has a special means of knowledge on the particular subject of relationship. Opinion means something more than retailing of gossip or of hearsay.

PRINCIPLES RELATING TO AND IN RESPECT OF THE RIGHTS OF CO-OWNERS IN JOINT PROPERTY

A Division Bench of Punjab High Court in Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1961 Punj 528, after considering a catena of judgments evolved certain principles relating to and in respect of the rights of co-owners in joint property. In para 78 of the judgment, the principles have been culled out as under:--

"The weight of the authorities and the principles which have been discussed above, give rise to the following propositions-

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as when a co-owner openly asserts his own title and denies that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition.

(8) The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

(9) Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered."

DEPOSIT MADE BY A HINDU OF HIS MONEY IN THE JOINT NAMES

In Padmanabhan Bhavani-vs.-Govindan Bhargavi AIR 1975 Kerala 83.the Kerala High Court after discussing several decisions including those of the Hon'ble Apex Court observed as follows:-

"From the above discussion the following propositions emerge

- (i) A deposit made by a Hindu of his money in the joint names of himself and his wife or any other person, on the terms that it is payable to either or survivor, does not on his death constitute a gift by him to the other person.
- (ii) In such a case without any declaration of trust, there is a resulting trust in favour of the depositor in the absence of any contrary intention or unless it can be proved that an actual gift of the amount was intended.
- (iii) The principle of English Law that a gift to a wife is presumed, where money belonging to the husband is deposited at a Bank in her name or where a deposit is made, in the joint names of both husband and wife has no application in India. In other words,

there is no presumption in India of an intended advancement as there is in England.

(iv) The burden of proving a contrary intention or gift is on the person who seeks to rebut the resulting trust in favour of the person who makes the deposit.

(v) This burden could be discharged either by proving that there was a specific gift or that the owner of the money had a general intention to benefit the claimant and that it was in pursuance of that intention that he made the deposit in the claimant's name or transferred the deposit to the joint names of himself and the claimant.

(vi) In the absence of such proof the amount under the deposit will form part of the owner's estate on his death and will be partible among the heirs."

THE PRINCIPLES GOVERNING THE DEVOLUTION OF INTEREST AND SUCCESSION IN MITAKSHARA COPARCENERY PROPERTY PRIOR TO THE AMENDMENT OF 2005

Hon'ble Apex Court in case law Uttam Vs. Saubhag Singh and other AIR 2016 SC 1169 after considering various case laws summarized the principles governing the devolution of interest and succession in Mitakshara coparcenary property prior to the amendment of 2005 reads as under:-

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest

in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property F.A. No.678/2000 or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various

persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

PIOUS OBLIGATION

Their Lordships of the **Supreme Court in a case reported in AIR 1967 SC 727**, Faquir Chand v. Harnam Kaur, which has been reproduced in Note 294A of Mull's Hindu Law 16th Edition, at page 383, which reads as follows:--

"(1) the son is under a pious obligation to pay all debts of the father, whether secured or unsecured. The second proposition applies not only to an unsecured debt but also to a mortgage debt which the father is personally liable to pay;

(ii) The second proposition applies in the case of a money decree for payment of debt before the sale is held and similarly it also applies in the case of mortgage decree and the son is not entitled to interfere with the execution of the decree with the sale of the property in execution proceedings (unless he can show that the debt was non existent or tainted with immorality or illegality)"

HINDU WOMENS ABSOLUTE OWNERSHIP OF HER PROPERTY

In (2011) 9 Supreme Court Cases 451, in the case of Marabasappa (Dead by LRs. and others v. Ningappa (dead) by LRs. and others:- Judgement "A. Hindu Succession Act, 1956 - Ss.5, 6, 14 to 16 and 19 - Property acquired by Hindu woman, whether becomes or blends in joint family property. Held, Hindu woman has full ownership over any property that she has acquired on her own or as stridhana - Such property shall not

become part of joint family property and she may dispose of same as per her wish".

PROSPECTIVE RIGHTS OF WOMEN UNDER HINDU LAW

The question as to whether, the Hindu Succession (Amendment) Act, 2005 will have retrospective effect or not, has been answered by the Supreme Court in *Prakash v. Phulavat* (2016)2 SCC 36. The Supreme Court held therein that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters were born. The Supreme Court further held that disposition or alienation including partition, which may have taken place before 20.12.2004 as per the law applicable prior to the said date, will remain unaffected.

LEGAL NECESSITY

Radhakrishnadas and another vs. Kaluram (dead), AIR 1967 SC 574, Where the alienation of joint family property is not approved by the sons, the burden is on the alienee to establish that the same was supported by legal necessity or benefit of the

family or that he made reasonable enquiry about existence of such necessity.

Smt. Rani and another vs. Smt. Santa Bala Debnath and others, AIR 1971 SC 1028 held that recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances.

BURDEN OF PROOF OF JOINT NUCLEUS AND SEPARATE PROPERTY

Smt. Radhamma vs. H.N. Muddukrishna AIR 2006 Karnataka 68 a division bench of Hon'ble Karnataka High Court at paragraph 29 and 30 has held as follows :

"29. With this nature of evidence, we have to see whether the burden of proof was shifted from plaintiffs to defendants to establish that the property as purchased out of their personal income. As a matter of fact, the initial burden is on the plaintiffs to establish that adequate nucleus was available for acquisition of such property. This again depends on the nature and the extent of the nucleus. When the details regarding the availability of joint family funds Patna High Court FA No.51 of 1979 dt.29-04-2013 11 and the nucleus are absent, question of shifting the

burden to the defendants does not arise. However, the defendants were able to establish that the property was purchased out of the income of her husband and other personal property of Smt. Saroja 30. In the present case, the property does not stand in the name of the male member of the joint family. It stands in the name of a female member. There is no presumption that it belongs to joint family when it stands in the name of female member. Therefore, the material placed before the Court would only establish that "H" schedule property is not purchased out of joint family funds."

(i) Makhan Singh (D) by LRs. v. Kulwant Singh (MANU/SC/7260/2007 : AIR 2007 SC 1808); (ii) Smt. Revamma and Another v. Basha Saab and Another [MANU/KA/7395/2007 : 2008 (4) Kar.L.J. 42]; and (iii) Smt. Radhamma and Others v. H.N. Mudukrishna and Others [MANU/KA/0506/2005 : 2006 (1) Kar.L.J. 176). In all these decisions the principle of law found is that burden is on the party to prove that source of acquisition of a certain property is the nucleus of the joint family and that surplus funds after meeting daily necessities must be available.

Akhileshwar Kumar and Ors. v. Mustaqim and Ors., AIR 2003 Supreme Court 532, wherein it was held that educated unemployed son was in need of setting himself independently in business and simply because he was provisionally assisting his father in family business does not mean that he should never start his own independent business.

Adv - Sridhara babu N

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CHAPTER WILL AND GIFT

PROBATE COURT DOES NOT DECIDE TITLE TO PROPERTY

In the case of Mrs. Hem Nolini Judah (Since Deceased)-vs.-Mrs. Isolyne Sarojbashini Bose, AIR 1962 SC 1471, our Apex Court observed that questions of title are not decided in proceedings for the grant of probate or letters of administration. Whatever happens in probate proceedings would not establish the title to the property covered by the Will in favour of anybody.

REVOCATION OF GIFT

(2007)13 SCC 210, in the case of Asokan vs. Lakshmikutty and others, when a registered document was executed and the parties are close relatives, a presumption of the correctness of the averments in the document has to be taken and the onus of proof would lie not on the donee but on the donor and it was the donor to prove that the document was not acted upon.

20. In the said judgment, registered deed of gift in favour of son was discussed and it was stated in that document that

possession was handed over to the son and the same was accepted by the son. In such circumstances, the Hon'ble Supreme Court held as follows:- ...It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. The Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. ..In the present case it is not a case that the appellant was not aware of the recitals contained in deeds of gift which recite the factum of handing over of possession of the properties which were the subject-matter of the gift. The very fact that the defendant donors contend that the donee was to perform certain obligations in lieu of the gift is itself indicative of the fact that the parties were aware thereof. Even a silence may sometimes indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift. ...Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift. The said deeds of gift were executed out of love and affection as well as on the ground that the donee is the son and successor of the donor and so as to enable him to live a good family life. The donors cannot later turn round and say that he was to fulfil a

promise. It is one thing to say that the execution of the deed is based on a aspiration or belief, but it is another thing to say that the same constituted an onerous gift. What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Contract Act. It was not done. ...It has been submitted by the donors that it would be open to them to prove that in fact no possession had been handed over. This case is concerned with the construction of recitals made in a registered document. When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. When such a presumption is raised coupled with the recitals in regard to putting the donee in possession of the property, the onus is on the donor and not on the donee.

PROBATE OF WILL – LEGAL CONSEQUENCES

Multivahuji vs Kalindivahuji And Ors. AIR 1994 Guj 42 It is now Well established general observation that the probate granted by a competent Court is conclusive evidence of the validity of such will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. Where the citation has been issued to the interested persons and has been served upon them, their failure to enter a caveat to contest the proceedings would preclude them from contesting the validity of the will in every proceedings. (See Smt. Rukmani Devy v. Narendra Lal Gupta, AIR 1984 Supreme Court

1888). It is also well established that a probate granted by a court of competent jurisdiction is conclusive evidence of the testamentary capacity of the testator as well as of the factum of its due execution and validity of the will. A probate is also conclusive as to the representative title of the executor. A probate is never conclusive about the construction or interpretation of the will nor does it determine the question of title to the property disposed of by the will. A probate is also not conclusive as to the right of the testator to dispose of the property. It is true that a Probate Court is an exclusive Court dealing with probate matters and deciding issues which squarely fall within its jurisdiction. On the other hand the ordinary civil court is not a court of limited jurisdiction. Such a Court is dealing with civil rights of the parties. The probate Court does not decide the civil rights of the parties. However, the question which exclusively fall within the jurisdiction of the Probate Court, viz. as to whether the document put forth is the last will or codicil of the deceased and as to whether such last will or codicil was duly executed and as to whether the testator was possessing the testamentary capacity can be decided by Probate Court only and on the aforesaid issues the decision of a Probate Court, being the Court of exclusive jurisdiction, shall take precedence and it shall be binding on the Court of ordinary civil jurisdiction at all levels.

In the case of Alagammal v. V. Radhammal, reported in AIR 1992 Madras 136. The Division Bench of Madras High Court speaking through Justice Nainar Sunderam (as His Lordship

then was) held that a decision of a probate court on the question of validity, genuineness and due execution of will is judgment in rem and cannot be attacked in courts of ordinary civil jurisdiction. In the said decision a comparison between the jurisdiction of Civil Court and a probate court was undertaken and in para 7 thereof the Court observed as under (at page 138):

Para 7: "As between the decision rendered by an ordinary Civil Court and the decision rendered by a Probate Court, on the question of truth, validity, genuineness and due execution of a will, the decision of the Probate Court is a judgment in rem, which will bind not only the parties before it, but the whole world is a well accepted proposition, which does not admit of any dispute. The decision of the ordinary civil Court, dealing with the same issue, would not constitute a judgment in rem. Such is the sanctity annexed to the decision of the Probate Court, which is a Court of exclusive jurisdiction. The Probate Court is a Court of conscience. It applies its mind to find out as to whether the document put forth in the last will or codicil of the deceased. It must arrive at the satisfaction as to the due execution of the document. It must be satisfied as to the testamentary capacity of the deceased. It is an exclusive court dealing with probate matters in contrast to the ordinary Civil Court, which is concerned only with deciding rights between parties. The probate Court does not decide rights between parties. Once the probate Court renders its decisions, that will take precedence on the relevant questions, over the decisions of the Courts of ordinary civil jurisdiction at all levels and will be binding on proceeding

pending before such Court. Those principles are so well known, we do not think we should cite authorities for them."

In the case of Chiranjilal Shrilal Goanka v. Jasjit Singh, reported in 1993 (2) SCC 507 : (1993 AIR SCW 1439) the Supreme Court of India has made pertinent observations about the nature of Probate proceeding in the following words: "The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself." After referring to the various provisions of the Indian Succession Act and the various decisions of the various High Courts Justice K. Ramaswamy speaking for the Court observed as under: ".....the probate court has been conferred with exclusive jurisdiction to grant probate of the will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rem and conclusive and binds not only the parties

but also the entire world. The award deprives the parties of statutory right of appeal provided under Section 298. Thus the necessary conclusion is that the probate court alone has exclusive jurisdiction and the civil court on original side or the arbitrator does not get jurisdiction, even if consented to by the parties, to adjudicate upon the proof or validity of the will propounded by the executrix, the applicant."

PROOF OF REGISTERED WILL

Rani Purnima Devi And Another vs Kumar Khagendra Narayan Dev 1962 AIR 567, 1962 SCR Supl. (3) 195 The mere fact that the will was registered was not by itself sufficient to dispel the suspicions without scrutiny of the evidence of registration. Registration would dispel the doubt as to the genuineness of the will only if it was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and the testator thereafter admitted its execution and signed in token thereof. In the present case, the registration was done in a perfunctory manner and the evidence did not establish that the testator knew that the document the execution of which he admitted before the sub-registrar's clerk was his will. The witnesses produced to prove registration, even if they are treated as attesting witnesses, failed to prove due execution and attestation of the will.

In *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao* **2007 AIR 614 = 2006 (10) Suppl. SCR 1214 = 2006 (13) SCC 433** Court held: "32. Section 63 of the Succession Act lays down the mode and manner of execution of an unprivileged will. Section 68 of the Evidence Act postulates the mode and manner of which proof of execution of document which is required by law to be attested. It in unequivocal terms states that execution of will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator

alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. Subject to above, proof of a will does not ordinarily differ from that of proving any other document."

In **Ramabai Padmakar Patil v. Rukminibai Vishnu Vekhande** **2003 AIR 3109 = 2003 (2) Suppl. SCR 583 = 2003 (8) SCC 537** Court held: "8. A will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a will. It is true that a propounder of the will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an offspring."

Madhukar D. Shende Vs. Tarabai Aba Shedage AIR 2002 SC 637 and more particularly paragraphs 8 and 9, which read as under: "8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that

is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in *R. v. Hodge*, 1838, 2 Lewis CC 227 may be apposite to some extent:

"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved

by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict -- positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

GIFT DEED AND ITS LEGAL EFFECTS

In the case of Pankajakshy Amma v. Chandramathy Amma reported in (2001) 1 Kerala Law Journal 438, the Kerala High Court has dealt with the issue as to what constitute a valid transfer as gift. The Court has observed that "Section 123 of the Transfer of Property Act deals with the manner of execution of gift deed. If the purpose is for making a gift of immovable property, the transfer must be effected by a registered instrument signed by on or behalf of the donor and attested by atleast two witnesses. By a reading of Section 122 and 123, it can be seen that in order to execute a valid gift, the following elements are to be proved:-

- (i) It must be a voluntary transfer.
- (ii) The gift must be accepted by the donee during the lifetime of donor.
- (iii) The gift must be effected by a registered document. It must be attested by two attestors.

If all the elements are fulfilled, there will be a valid gift, if not, it will have no legal consequence."

As per the commentary of Sanjiva Row on Transfer of Property Act 6th Edition - page 126 para 13), "mutation or change of name in the revenue records does not itself operate as a transfer. It is only evidence of transfer".

OWNERSHIP CAN BE GIFTED WITHOUT ITS POSSESSION AND RIGHT OF ENJOYMENT

K. Balakrishnan v. K.Kamalam (AIR 2004 SC 1257) It was open to the donor to transfer by gift title and ownership in the property and at the same time reserve its possession and enjoyment to herself during her lifetime. There is no prohibition in law that ownership in property cannot be gifted without its possession and right of enjoyment. Under Section 6 of the Transfer of Property Act "property of any kind may be transferred" except those mentioned in clauses (a) to (i). Section 6 in relevant part reads thus :-

"6. What may be transferred.- Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force,-

(a)

(b) A mere right to re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c)

(d) All interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A mere right to sue [***] cannot be transferred.

CANCELLATION OF GIFT DEED IS ONLY BY WAY OF SUIT

In Narayanamma and Anr.v. Papanna, 1988 (1) Kar. LJ. 80 : ILR 1987 Kar. 3892, it was held that cancellation of gift deed by 3rd defendant by another registered deed was not legal and valid as per the aforesaid decision, the remedy was to file a suit seeking cancellation of the gift deed.

ACCEPTANCE OF GIFT

The Supreme Court in *K.Balakrishnan v. Kamalam* [AIR 2004 SC 1257] held that when the gift is in favour of a minor created by the mother, natural guardian and she retained possession and the right of enjoyment, ownership of property by minor can be presumed by silent acceptance.

GIFT UNDER MUSLIM LAW

Transfer of Property Act are not applicable in the case of a gift in Muslim Law. In Muslim Law there can be an oral gift also. There are five types of gifts as per Muslim personal law, they are:

- (i) Hiba
- (ii) Ariat
- (iii) Sadaqa
- (iv) Hiba-bil.iwaz
- (v) Hiba-ba-sharat-ul-iwaz.

As far as the Muslim gift is concerned, conditions necessary for a valid disposition is;

- (i) majority
- (ii) understanding
- (iii) freedom
- (iv) ownership of subject matter of disposition.

Hiba is a bilateral transaction, which takes effect when the donor declares the Hiba and the donee signifies his or her acceptance of the same. The ingredients to constitute Hiba are as follows: (i) disposition must be gratuitous.

(ii) it must effect mere transfer of the corpus of a property by one person to another.

(iii) Transfer should be unconditional. (iv) The property transferred must be in existence and should be specified.

The three essential conditions to constitute the gift are

(i) declaration of gift by the donor (Igde)

(ii) acceptance of the gift, express or implied, by or on behalf of the donee (Quabul)

(iii) delivery of the subject matter of the gift by the donor to the donee (Quada).

Hiba is an immediate and unconditional transfer of the corpus of the property without any return. Every Muslim, who has attained majority and has a sound mind can make a gift. The gift is complete not on the declaration of the date of acceptance, but on the date on which possession is delivered. It is also essential that for validity of a gift the donor should divest himself completely of all ownership and domain over the subject of gift. What is essential is that there should be a gift of the corpus. If the donor reserves to himself the right to be in possession of the corpus and the right to enjoy the same, there cannot be a valid gift as per the Muslim Law. But reservation of life interest and right of residence stand on a different footing.

Katheessa Umma v. Narayanath Kunhambu (AIR 1964 SC 275) "Where a husband, a Hanafi, makes a gift of properties, including immovable property, by a registered deed, to his minor wife who had attained puberty and discretion, and the gift is accepted on her behalf by her mother in whose house the husband and wife were residing, when the minor's father and father's father are not alive and there is no executor of the one or the other, such a gift must be accepted as valid and complete although the deed is handed over to the minor's mother and possession of the property is not given to a guardian specially appointed for the purpose by the civil Court. There can be no question that there was a complete intention to divest ownership, on the part of the husband of the donor, and to transfer the property to the donee. If the husband had handed over the deed to his wife, the gift would have been complete under Muhammadan law and it is impossible to hold that by handing over the deed to his mother- in-law, in whose charge his wife was, the husband did not complete the gift."

The Muslim Personal Law (Shariat) Application Act (26 of 1937) came into existence on 07.10.1937. The clear prescription of the said Act is that in a case of gift involving a donor and donee being Muslims, the law applicable to them shall be the Muslim Personal Law (Shariat). Section 2 of the said Act is extracted herein for better appreciation: "2.Application of Personal Law to Muslims.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural

land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religion endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

Going by the Muslim personal law the natural guardians are father, grand father, executor appointed by the father or executor appointed by the grand father. Mother was never considered to be the natural guardian except in case of girl child till certain age.

There cannot be any quarrel about the principle of Mahomedan Law that a gift to a person not yet in existence is void.

Even under paragraph 141 of Mulla's Mahomedan Law it is observed that a gift does not fail in its entirety if it is made in favour of living persons and also in favour of unborn persons and that it would be void only to the extent to which interest is created in favour of unborn persons. The Muslim law does not recognise a gift in favour of an unborn person through the medium of trust. (Vide paragraph 151 of Mulla's Mahomedan Law) . Under the general law governed by the provisions of the T.P.Act , however, gifts to unborn persons through the medium of trust is recognised.

The normal rule of Mahomedan Law is that a gift can be revoked at any time before delivery of possession, subject, of course, to

certain exceptions where a gift can be revoked even after delivery of possession. But where the donee is related to the donor within the prohibited degrees, the aforesaid exception does not apply.

GIFT IN FAVOUR OF UNBORN PERSON UNDER HINDU LAW

In *F.M. Devaru Ganapati Bhat v. Prabhakar Ganapati Bhat* - AIR 2004 SC 2665 - It was held that where a gift was made by a woman in favour of her brother's son then living with a stipulation that if other male children were later born to her brother they shall also be joint holders with the donee who was living at the time of gift, the stipulation would not be hit by Sec. 13 of T.P. Act but would be permissible and valid in view of Sec. 20 of T.P. Act.

GIFT IS WITHOUT CONSIDERATION

In *Smt. SHAKUNTALA v. STATE OF HARYANA*, AIR 1979 SC 843, their Lordships of the Supreme Court's observations as under: "It is therefore one of the essential requirements of a gift that it should be made by the donor 'without consideration'. The word 'consideration' has not been defined in the Transfer of Property Act, but we have no doubt that it has been used in that Act in the same sense as in the Indian Contract Act and excludes natural love and affection. If it were to be otherwise, a transfer would really amount to a sale within the meaning of Section 54 of the Transfer of Property Act, or to an exchange within the meaning of Section 118 for each party will have the rights and be subject to the liabilities of a seller as to what he gives and have the rights

and be subject to the liabilities of a buyer as to that which he takes."

ONCE A GIFT IS COMPLETE, THE SAME CANNOT BE RESCINDED

Judgment reported in (2007)13 SCC 210, in the case of Asokan vs. Lakshmikutty and others, when a registered document was executed and the parties are close relatives, a presumption of the correctness of the averments in the document has to be taken and the onus of proof would lie not on the donee but on the donor and it was the donor to prove that the document was not acted upon. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. The Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. ..In the present case it is not a case that the appellant was not aware of the recitals contained in deeds of gift which recite the factum of handing over of possession of the properties which were the subject-matter of the gift. The very fact that the defendant donors contend that the donee was to perform certain obligations in lieu of the gift is itself indicative of the fact that the parties were aware thereabout. Even a silence may sometimes indicate acceptance. It is not

necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift. ...Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift. The said deeds of gift were executed out of love and affection as well as on the ground that the donee is the son and successor of the donor and so as to enable him to live a good family life. The donors cannot later turn round and say that he was to fulfil a promise. It is one thing to say that the execution of the deed is based on an aspiration or belief, but it is another thing to say that the same constituted an onerous gift. What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Contract Act. It was not done. ...It has been submitted by the donors that it would be open to them to prove that in fact no possession had been handed over. This case is concerned with the construction of recitals made in a registered document. When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. When such a presumption is raised coupled with the recitals in regard to putting the donee in possession of the property, the onus is on the donor and not on the donee.

**REGISTRATION MAY TAKE PLACE WITHOUT THE
EXECUTANT REALLY KNOWING WHAT HE WAS
REGISTERING**

In *Purnima Devi v. Khagendra Narayan*, **1962 AIR 567, 1962 SCR Supl. (3) 195** was a case of Will wherein also the effect of registration came for consideration. In paragraph 23 of the Judgment their Lordships held thus. the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a Will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the Will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the office registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a Will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the Will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering."

GIFT DEED AND POSSESSION

2007 (13) SCR 901 ASOKAN VS LAKSHMIKUTTY & ORS.

Transfer of Property Act; Ss.122 & 123: Gift-Donor-parents executed a deed of gift transferring possession of property gifted in favour of his son-donee-Averment in a deed of gift in regard to handing over of possession-Whether amounts to sufficient proof of acceptance thereof by donee-Held:- In order to constitute a valid gift, acceptance thereof is essential-Even a silence may sometimes indicate acceptance-Overt act not necessary as express acceptance need not be required for completing the transaction of gift-When a registered document is executed, presumption arises in regard to the correctness thereof -Onus lies on the donor and not on the donee-The fact that possession had been given to donee raises a presumption of acceptance-Thus, the gift in question is a valid gift-Once a gift is complete, it cannot be rescinded on the ground of subsequent conduct of the donee.

Allowing the appeal, the Court HELD:

Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. However, the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance.

While determining the question as to whether delivery of possession would constitute acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the parents-donor contended that the donee, son, was to perform certain obligations, is itself indicative of the fact that the parties were aware thereof. Even a silence may sometime indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. When such a presumption is raised coupled with the recitals in regard to putting the donee in possession of the property, the onus should be on the donor and not on the donee.

The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. Even assuming that the legal presumption therefore may be raised, the same is a rebuttable one but in a case of this nature, a heavy onus would lie on the donors.

Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift.

Pandit Chunchun Jha vs Sheikh Ebadat Ali And Anr. **AIR 1954 SC 345**, The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of

repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decision on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts. But certain broad principles remain. The first is that the intention of the parties is the determining factor But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine that was intended.

Hanumappa Bhimappa Koujageri vs Bhimappa Sangappa Asari ILR 1996 KAR 1517, 1996 (5) KarLJ 67 It is clear from the just above observations of the Supreme Court that the intention of the parties is to be gathered from the document itself, an extraneous enquiry of what was thought is ruled out. Sometimes, there may be a cause extraneous enquiry where a

claim is made that the document is void or illegal on the ground that a different document than the document which was intended was got executed. But, this is not so here in the present case. Here even in the written statement, it is admitted that the Sale Deed was executed. It was also stated that it was otherwise agreed or intended, it will operate as security.

Harichand Mancharam v. Govind Luxman Gokhale, AIR 1923

PC 47. Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape.... The fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement.

GIFT DEED AND ITS VALIDITY

ASOKAN VS LAKSHMI KUTTY 2007(13) SCR 901, It is settled law that where the deed of gift itself recites that the donor has given possession of the properties gifted to the donee, such a recital is binding on the heirs of the donor. It is an admission binding on the donor and those claiming under him. Such a recital raised a rebuttable presumption and is ordinarily sufficient to hold that there was delivery of possession. Therefore, the burden lies on those who allege or claim the contrary to prove affirmatively that in spite of the recitals in the gift deed to the effect that possession

has been delivered over, in fact, the subject matter of the gift was not delivered over to the donees. When a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift.

The definition of gift contained in Section 122 of the Transfer of Property Act provides that the essential elements thereof are:

- (i) the absence of consideration;
- (ii) the donor;
- (iii) the donee;
- (iv) the subject matter
- (v) the transfer; and
- (vi) the acceptance.

Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. We must, however, notice that the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also

amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance.

WILL WAS AGAINST NATURAL COURSE OF THINGS.

In Smt. Safi Devi v. Mahadeo Prasad and others, AIR 1978 All 215, it has been held that where the transferor of property claimed ownership of the property transferred under a will which was alleged to be executed in his favour by disinheriting the owner and the grandson and the same could not be produced by the transferor of the transferee from him, the allegation about execution of the will must be deemed to be pure concoction as such will was against natural course of things.

CHAPTER SUIT AGAINST GOVERNMENT

CASE AGAINST GOVERNMENT

In Ranjeet Mal Vs. General Manager, Northern Railway, New Delhi & Anr., AIR 1977 SC 1701, this Court considered a case

where the writ petition had been filed challenging the order of termination from service against the General Manager of the Northern Railways without impleading the Union of India. The Court held as under :- "The Union of India represents the Railway Administration. The Union carries administration through different servants. These servants all represent the Union in regard to activities whether in the matter of appointment or in the matter of removal. It cannot be denied that any order which will be passed on an application under Article 226 which will have the effect of setting aside the removal will fasten liability on the Union of India, and not on any servant of the Union. Therefore, from all points of view, the Union of India was rightly held by the High Court to be a necessary party. The petition was rightly rejected by the High Court."

SECTION 80 - CAST AN IMPLIED DUTY ON ALL CONCERNED GOVERNMENTS AND STATE AND STATUTORY AUTHORITIES TO SEND APPROPRIATE REPLY TO SUCH NOTICES - GOVERNMENTS, TO NOMINATE, WITHIN A PERIOD OF THREE MONTHS, AN OFFICER WHO SHALL BE MADE RESPONSIBLE TO ENSURE THAT REPLIES TO NOTICES UNDER SECTION 80

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The two months' period mentioned in Section 80(1) of the Code has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires the service of notice as a condition precedent for filing of suit and prescribed period therefor, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various Courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in a few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

These provisions cast an implied duty on all concerned Governments and State and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, it is directed that all concerned Governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an Officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him.

IT IS ALWAYS DESIRABLE THAT THE PETITIONER-STATE SHOULD BE PROVIDED WITH AN OPPORTUNITY TO DEFEND ITS CAUSE

The Commissioner, Karnataka ... vs Nirupadi Virbhadrappa Shiva AIR 2001 Kant 504, ILR 2001 KAR 4338, 2001 (6) KarLJ 402 What is the role of the State as a defendant in a declaratory suit? Is it a mere formal party or should it evince substantial interest in the matter in its capacity as the representative of the people in order to preclude any public injury that would result in the event of the plaintiff succeeding in his

endeavour? In such a situation, it is always desirable that the petitioner-State should be provided with an opportunity to defend its cause. If the State is prevented from doing so, under the guise of finality, it would lead to public injury and denial of a fair trial to the State.

IMPORTANCE OF SECTION 80 CPC NOTICE TO LITIGATIONS INVOLVED GOVERNMENT

In *State of Andhra Pradesh v. Gundugola Venkata Suryanarayana Garu* 1965 AIR 11, 1964 SCR (4) 945, it is held : The object if the notice under Section 80 of the CPC is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the claim out of Court. The section is imperative and must be strictly construed. The right to institute a representative action may be exercised by one or more persons having an interest which is common with the others, but it can only be exercised with the permission of the Court. If the Court grants permission to one person to institute such a representative action and if that person had served the notice under Section 80, the circumstance that another person had joined him in serving the notice but did not effectuate that notice by joining in the suit, would not be sufficient ground for regarding the suit as defective.

In the case of *Bihari Chowdhary and Anr. V. State of Bihar and Ors.* 1984 AIR 1043, 1984 SCR (3) 309, it is observed: A suit against the Government or a public officer, to which the

requirement of a prior notice under Section 80 of the CPC is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable. The effect of section 80 CPC prior to its amendment by Act 104 of 1976 is clearly to impose a bar against the institution of a suit against the Government or a public officer in respect of any act purported to be done by him in his official capacity until the expiration of two months after notice has been delivered. There is clearly a public purpose underlying this mandatory provision. The examination of the scheme of the Section reveals that the section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinise the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person who issued the notice, to institute the suit involving considerable expenditure and delay. When the language used in the Statute is clear and unambiguous it is the plain duty of the Court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the legislature.

**WHEN PLAINT ON THE FACE OF IT IS BARRED BY LAW –
REGARDING SECTION 80 MANDATORY NOTICE**

Gangappa Gurupadappa Gugwad v Rachawwa and Others, 1971 AIR 442, 1971 SCR (2) 691 No doubt it would be open to a court not to decide all the issues which may arise on the pleadings before it if it finds that the plaint on the face of it is barred by any law. If for instance the plaintiff's cause of action is against a Government and the plaint does not show that notice under section 80 of the Code of Civil- Procedure claiming relief was served in terms of the said section,, it would be the duty of the court to reject the plaint recording an order to that effect with reason for the order.

**NO CIVILIZED SYSTEM CAN PERMIT AN EXECUTIVE TO
PLAY WITH THE PEOPLE OF ITS COUNTRY AND CLAIM THAT
IT IS ENTITLED TO ACT IN ANY MANNER AS IT IS
SOVEREIGN.**

In N. Nagendra Rao v. State of Andhra Pradesh [MANU/SC/0530/1994 : AIR 1994 SC 2663], the Supreme Court has observed that in the modern sense the distinction between sovereign or non-sovereign power does not exist. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of

officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizen are required to be reconciled so that the rule of law in a welfare State is not shaken. In the welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime

etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. Maintenance of law and order or repression of crime may be inalienable function, for proper exercise of which the State may enact a law and may delegate its functions, the violation of which may not be sueable in torts, unless it trenches into and encroaches on the fundamental rights of life and liberty guaranteed by the Constitution. But that principle would not be attracted where similar powers are conferred on officers who exercise statutory powers which are otherwise than sovereign powers as understood in the modern sense. The suit for damages for negligence of officers of State in discharging statutory duty is maintainable, is also supported by Art. 300.

In State of A. P. v. C.R. Reddy [MANU/SC/ 0368/2000 : AIR 2000 SC 2083], it has been observed that "the Maxim that King can do no wrong or that the Crown is not answerable in tort has no place in Indian jurisprudence, where the power vests, not in the Crown, but in the people who elect their representatives to run the Government, which has to act in accordance with the provisions of the Constitution and would be answerable to the people for any violation thereof". It is observed that "the Fundamental Rights, which also include basic human rights, continue to be available to a prisoner and those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by this Court". It is further stated : "in this process of judicial advancement, Kasturi Lal's case (supra) has paled into

insignificance and is no longer of any binding value". The Supreme Court further proceeded to observe in paras 31 and 32 as under :- "This Court, through a stream of cases, has already awarded compensation to the persons who suffered personal injuries at the hands of the officers of the Government including Police Officers and personnel for their tortious act. Though most of these cases were decided under Public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as a fact." "Moreover, these decisions, as for example, Nilabti Behera v. State of Orissa, MANU/SC/0307/1993 : AIR 1993 SC 1960. In Re : Death of Sawinder Singh Grover, (1995) Supp (4) SCC 450 and D.K. Basu v. State of West Bengal, MANU/SC/0157/1997 : AIR 1997 SC 610, would indicate that so far as Fundamental Rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortious action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail."

The Supreme Court in D.K. Basu v. State of West Bengal [MANU/SC/0157/1997 : AIR 1997 SC 610] has reiterated Smt. Nilabati Behera alias Lalita Behera (MANU/SC/0307/1993 : AIR 1993 SC 1960) as follows:- "Till about two decades ago the liability of the Government for tortuous act of its public servants was generally limited and the person affected could enforce his right in tort by filing a civil suit and there again the defence of

sovereign immunity was allowed to have its play. For the violation of the fundamental right to life or the basic human rights, however, this Court has taken the view that the defence of sovereign immunity is not available to the State for the tortuous acts of the public servants and for the established violation of the rights guaranteed by Article 21 of the Constitution of the India. In *Nilabati Behera v. State* (MANU/SC/0307/1993 : 1993 AIR SCW 2366) (supra) the decision of this Court in *Kasturi Lal Ralia Ram Jain v. State of U.P.*, MANU/SC/0086/1964 : (1965) 1 SCR 375 : (AIR 1965 SC 1039), wherein the plea of sovereign immunity had been upheld in a case of vicarious liability of the State for the tort committed by its employees was explained?."

In State of Andhra Pradesh v. Challa Ramkrishna Reddy and others [MANU/SC/0368/2000 : AIR 2000 SC 2083], the Supreme Court has noticed *N. Nagendra Rao and Co. v. State of A.P.* MANU/SC/0530/1994 : AIR 1994 SC 2663 wherein immunity of the State for sovereign functions has been explained as follows:-

"But there the immunity ends. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a

juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as 'sovereign and non-sovereign' or 'governmental or nongovernmental' is not sound. It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown but merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the 'financial instability of the infant American States rather than to the stability of the doctrine theoretical foundation', or because of 'logical and practical ground', or that 'there could be no legal right as against the State which made the law gradually gave way to the movement from, 'State irresponsibility to State responsibility'. In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere,

educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity." The Supreme Court ultimately has held as follows:-

"This Court, through a stream of cases, has already awarded compensation to the persons who suffered personal injuries at the hands of the officers of the Government including police officers and personnel for their tortuous act. Though most of these cases were decided under public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as a fact. Moreover, these decisions, as far example, *Nilabati Behera v. State of Orissa*, MANU/SC/0307/1993 : (1993) 2 SCC 746: (1993) 2 SCR 581 : AIR 1993 SC 1960: (1993 AIR SCW 2366): *In Re: Death of Sawinder Singh Grover*, (1995) Supp (4) SCC 450: (1992) 6 JT (SC) 271: 1992(3) Scale 34(2); and *D.K. Basu v. State of West Bengal*, MANU/SC/0157/1997 : (1997) 1 SCC 416 : AIR 1997 SC 610: (1997 AIR SCW 233), would indicate that so far as fundamental rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortuous action of its officers by raising

the plea of immunity for sovereign acts or acts of State, which must fail."

In State of Madhya Pradesh and another v. Smt. Shantibai and another [MANU/MP/0423/2003 : AIR 2005 MP 66] on the question whether the State Government is not liable to pay damages because of the doctrine of sovereign immunity, it has been held as follows: "..... In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. Maintenance of law and order or repression of crime may be inalienable function, for proper exercise of which the State may enact a law and may delegate its functions, the violation of which may not be sueable in torts, unless it trenches into and encroaches on the fundamental rights of life and liberty guaranteed by the Constitution. But that principle would not be attracted where similar powers are conferred on officers who exercise statutory powers which are otherwise than sovereign powers as understood in the modern sense. The suit for damages for negligence of officers of State in discharging statutory duty is

maintainable, is also supported by Art. 300.In view of the above legal position, the plea of sovereign immunity is not available to the defendants in the present case. The plaintiffs sustained injuries at the hands of police officers even though unwittingly. They deserve some compensation from the State to repair the damage done to them. They were innocent victims. The judgment and decree of the trial court are unassailable."

Hon'ble Supreme Court in D.K. Basu v. State of W. B., reported in MANU/SC/0157/1997 : (1997) 1 SCC 416 : (AIR 1997 SC 610) in which the Supreme Court held that custodial violence, including torture and death in the lockups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society, observed the Supreme Court. The question before the Supreme Court was whether monetary compensation should be awarded for established infringement of the fundamental rights guaranteed under Articles 21 and 22 of the Constitution of India. It was observed: "Whether it is physical assault or rape in police custody, the extent of trauma a person experiences is beyond the purview of law." "Custodial torture" is held to be a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality.

It was held that the expression "life or personal liberty" in Article 21 includes the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. The precious right guaranteed by Article 21 cannot be denied to convicts, under-trials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. It was observed that it cannot be said that a citizen 'sheds off' his fundamental right to life the moment a policeman arrests him. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21, whether it occurs during investigation, interrogation or otherwise. It was further observed that the interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. Referring to Kasturi Lal's case (MANU/SC/0086/1964 : AIR 1965 SC 1039) (supra), the Supreme Court reiterated what it had said in Nilabati Behera v. State of Orissa, reported in MANU/SC/0307/1993 : (1993) 2 SCC 746 : (AIR 1993 SC 1960) reproducing the following observations which appeared at page 761 of the reports (at page 1967 of AIR) : "In this context, it is sufficient to say that the decision of this Court in Kasturilal (MANU/SC/0086/1964 : AIR 1965 SC 1039) upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for

contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in *Rudul Sah* (MANU/SC/0380/1983 : AIR 1983 SC 1086) and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, *Kasturilal* related to the value of goods seized and not returned to the owner due to the fault of Government servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. *Kasturilal* is, therefore, inapplicable in this context and distinguishable."The Supreme Court then held that the claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. It was held : "Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected

and preserved." It was further observed : "The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the Courts too much, as the protector and custodian of the indefeasible rights of the citizens."

The Court reiterated what was stated in Nilabati Behera's case that it was not always enough to relegate the heirs of victim of custodial death to the ordinary remedy of a civil suit to claim damages, as that remedy in private law indeed is available to the aggrieved party. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy, as held by the Supreme Court in Nilabati Behera's case (MANU/SC/0307/1993 : AIR 1993 SC 1960) (supra). We then would reproduce hereunder paragraph 54 of the judgment which in our view clearly lays down that the State is vicariously liable for the acts of its public servants which amount to an established infringement of the fundamental right to life and that the claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State of such award of compensation in public law jurisdiction is without prejudice to any other action, like civil suit for damages, which is lawfully available to the victim or the heirs of the deceased-victim with respect to the same matter. "54. Thus, to sum up, it is now a well-accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable

remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal Courts in which the offender is prosecuted, which the State, in law, is duty-bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased-victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

In Bakshi Amrik Singh v. The Union of India (MANU/PH/0325/1972 : 1974 ACJ 105) (FB), a Bench of five Judges of the High Court of Punjab and Haryana at length considered all the decisions on the question and ultimately laid down 11 tests :

"Though sovereign functions of a State have nowhere been exhaustively enumerated nor is there any authoritative definition of what constitutes the sovereign functions from a review of the ratio of the various authorities that have been noticed above, certain rules of guidance, which appear to be well settled emerge and they may be stated thus :

1. Under Article 300(1) of the Constitution of India, the Union of India and the states in our Republic have the same liability for being sued for torts committed by their employees as was that of the East India Company.
2. The nature and extent of this liability, as stated in P. and O. Steam Navigation Company's case and authoritatively settled by their Lordships of the Supreme Court in Kasturi Lal's case is that the Union of India and states are liable for damages occasioned by the negligence of servants in the service of the Government if the negligence is such as would render an ordinary employer liable.
3. That in view of the rule stated above Government is not liable if the tortious act complained of has been committed by its servant in exercise of its sovereign powers by which we mean powers that cannot be lawfully exercised except by sovereign or a person by virtue of delegation of sovereign rights.

4. The Government is vicariously liable for the tortious acts of its servants or agents which are not proved to have been committed in the exercise of its sovereign functions or in exercise of the sovereign powers delegated to such public servants.

5. The mere fact that the act complained of was committed by a public servant in course of his employment is not enough to absolve the Government of the liability for damages for injury caused by such act.

6. When the State pleads immunity against claim for damages resulting from injury caused by negligent act of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or an employment which is referable to the exercise of the delegated sovereign powers.

7. There is a real and marked distinction between the sovereign functions of the Government and those which are not sovereign and some of the functions that fall in the latter category are those connected with trade, commerce, business and industrial undertakings.

8. Where the employment in the course of which the tortious act is committed is such in which even a private individual can engage, it cannot be considered to be a sovereign act or an act committed in the course of delegated sovereign functions of the State.

9. The fact that the vehicle, which is involved in an accident, is owned by the Government and driven by its servant does not render the Government immune from liability for its rash and

negligent driving. It must further be proved that at the time the accident occurred, the person driving the vehicle was acting in discharge of the sovereign function of the State, or such delegated authority."

Apex Court in Lucknow Development Authority v. M.K. Gupta, JT 1993 (6) SC 307 said: An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law.... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.... Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. (para 10) The above observation as such have been reiterated in Ghaziabad Development Authorities v. Balbir Singh, JT 2004 (5) SC 17.

Similarly in **Registered Society v. Union of India and Others, MANU/SC/0976/1996 : (1996) 6 SCC 530**, the Apex Court said: No public servant can say "you may set aside an order on the ground of mala fide but you cannot hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary.

In Shivsagar Tiwari v. Union of India, MANU/SC/1283/1996 : (1996) 6 SCC 558, the Court said: An arbitrary system indeed

must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit.

In Delhi Development Authority v. Skipper Construction and Another, MANU/SC/0191/1996 : AIR 1996 SC 715, the Court has held : A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless.

The Apex Court has summarised "malice in law" in (Smt.) **S.R. Venkatraman v. Union of India and another, MANU/SC/0359/1978 : AIR 1979 SC 49**, as under : It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature

retirement of Government servants only in the 'public interest', to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power.

In Mukesh Kumar Agrawal v. State of U.P. and others, JT 2009 (13) SC 643, the Apex Court said : We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved.

In Somesh Tiwari v. Union of India and others, MANU/SC/8494/2008 : 2009 (2) SCC 592, dealing with the question of validity of an order of transfer on the ground of malice in law, the Apex Court in para 16 of the judgment observed as under: 16. ...Mala fide is of two kinds --one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e. on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the

order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal.

In HMT Ltd. and another v. Mudappa and others, JT 2007 (3) SC 112, the Apex Court in paras 18 and 19 defined malice in law by referring to "Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989" as under: The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite". It is a deliberate act in disregard of the rights of others. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e. legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary, and hence, notification was issued. Such an action could not be held mala fide.

CORRUPTION IS ANTITHESIS OF GOOD GOVERNANCE AND DEMOCRATIC POLITICS

Jai Singh vs. State of U.P.: MANU/UP/1718/2012

52. It

also answers description of word "corruption" which has taken various shades in our system. In general the well accepted meaning of corruption is the act of corrupting or of impairing integrity, virtue, or moral principle; the state of being corrupted or debased; lost of purity or integrity; depravity; wickedness; impurity; bribery. It further says, "the act of changing or of being changed, for the worse; departure from what is pure, simple, or correct; use of a position of trust for dishonest gain."

53. Though in a civilised society, corruption has always been viewed with particular distaste to be condemned and criticised by everybody but still one loves to engage himself in it if finds opportunity, ordinarily, since it is difficult to resist temptation. It is often, a kind, parallel to the word 'bribery', meaning whereof in the context of the politicians or bureaucrats, induced to become corrupt.

54. The Greek Philosopher Plato, in 4th Century BC said, "in the Republic that only politicians who gain no personal advantage from the policies they pursued would be fit to govern. This is recognised also in the aphorism that those who want to hold power are most likely those least fit to do so." While giving speech before the House of Lords William Pitt in the later half of 18th Century said, "Unlimited power is apt to corrupt the minds of those who possess it." Lord Acton in his letter addressed to Bishop Creighton is now one of the famous quotation, "Power tends to corrupt and absolute power corrupts absolutely."

55. Corruption is a term known to all of us. Precise meaning is illegal, immoral or unauthorized act done in due course of

employment but literally it means "inducement (as of a public official) by improper means (as bribery) to violate duty (as by committing a felony)." It is a specially pernicious form of discrimination. Apparently its purpose is to seek favourable, privileged treatment from those who are in authority. No one would indulge in corruption at all if those who are in authority, discharge their service by treating all equally.

56. We can look into it from another angle. Corruption also violates human rights. It discriminates against the poor by denying them access to public services and preventing from exercising their political rights on account of their incapability of indulging in corruption, of course on account of poverty and other similar related factors. Corruption is, therefore, divisive and makes a significant contribution to social inequality and conflict. It undermines respect for authority and increases cynicism. It discourages participation of individuals in civilised society and elevates self interest as a guide to conduct. In social terms we can say that corruption develops a range bound field of behaviour, attitude and beliefs.

57. Corruption is antithesis of good governance and democratic politics. It is said, that when corruption is pervasive, it permeates every aspect of people's lives. It can affect the air they breathe, the water they drink and the food they eat. If we go further, we can give some terminology also to different shades of corruption like, financial corruption, cultural corruption, moral corruption, Idea logical corruption etc. The fact remains that from whatever angle we look into it, the ultimate result borne out

is that, and the real impact of corruption is, the poor suffers most, the poverty grows darker, and rich become richer.

58. It is not that the Apex Court is oblivious of the situation at ground level. It had also occasion to comment thereon time and again. In *Secretary, Jaipur Development Authority v. Daulat Mal Jain*, 1997 (1) SCC 34: ... When satisfaction sought in the performance of duties is for mutual personal gain, the misuse is usually termed as 'corruption'.

59. In *High Court of Judicature at Bombay v. Shirishkumar Rangrao Patil*, MANU/SC/0692/1997 : 1997 (6) SCC 339, the Court held: Corruption, appears to have spread everywhere. No facet of public function has been left unaffected by the putrefied stink of 'corruption'. 'Corruption' thy name is depraved and degraded conduct.....In the widest connotation, 'corruption' includes improper or selfish exercise of power and influence attached to a public office.

60. Again the Court in *B.R. Kaput v. State of T.N.*, MANU/SC/1659/2001 : 2001(7) SCC 231, said: ... scope of 'corruption' in the governing structure has heightened opportunism and unscrupulousness among political parties, causing them to marry and divorce one another at will, seek opportunistic alliances and coalitions often without the popular mandate.

61. In *State of A.P. v. V. Vasudeva Rao*, MANU/SC/0916/2003 : 2004 (9) SCC 319, the Court took judicial notice of this epidemic and said: ... The word 'corruption' has wide connotation and embraces almost all the spheres of our day-to-day life the world over. In a limited sense it connotes

allowing decisions and actions of a person to be influenced not by rights or wrongs of a cause, but by the prospects of monetary gains or other selfish considerations.

Adv - Sridhara babu N

CHAPTER PARTIES TO SUIT

IMPLEADING APPLICATION

In Sangamesh Printing Press v. Chief Executive Officer, Taluk Development Board (1999) 6 SCC 44, the State was not impleaded as a party before the Trial Court in a money recovery suit. The same was dismissed on the ground of non-impleadment of necessary party. During appeal, an application was made under O. 1 R. 10 praying for impleadment of the State, however the High Court decided the matter on merits without considering the same. This Court observed as under : "Keeping in view the facts and circumstances of the case, we are of the opinion that the High Court should have decided the appellant's application under Order 1 Rule 10 C.P.C. and, thereafter, proceeded to hear the appeal in question. Not having disposed of the application under Order 1 Rule 10 has caused serious prejudice to the appellant. We, therefore, set aside the judgment of the High Court and restore Regular First Appeal No 29 of 1987 to its file. The High Court should first deal with the application under Order 1 Rule 10 C.P.C. which is pending before it and then proceed to dispose of the appeal in accordance with law."

Chief Conservator of Forests, Government of A.P. Vs. Collector & Ors; AIR 2003 SC 1805, this Court accepted the submission that writ cannot be entertained without impleading the State if relief is sought against the State. This Court had drawn the analogy from Section 79 CPC, which directs that the State shall be the authority to be named as plaintiff or defendant in a suit by or against the Government and Section 80 thereof directs notice to the Secretary of that State or the Collector of the district before the institution of the suit and Rule 1 of Order

XXVII lays down as to who should sign the pleadings. No individual officer of the Government under the scheme of the constitution nor under the CPC, can file a suit nor initiate any proceeding in the name and the post he is holding, who is not a juristic person.

In Bal Niketan Nursery School Vs. Kesari Prasad AIR 1987 SC 1970, this Court held that application for impleadment of a necessary party can be filed at any stage of proceeding provided the Court is satisfied that exceptional circumstances prevailing in the case, warrant the impleadment.

SUIT MAY BE CONTINUED AGAINST THE PERSON ACQUIRING THE INTEREST WITH THE LEAVE OF THE COURT

In the case of **Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (deceased) through his Chela Shiamma Dass, AIR 1975 Supreme Court 2159**, while considering the effect of devolution of interest within the meaning of Order 22 Rule 10 of the Code, on the trial of a suit during its pendency, this Court has laid down the law at page 2160 which runs thus:- This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has

to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22, Rule 10, is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule.

DEATH OF PARTIES AND ABATEMENT OF SUIT

MANGLURAM DEWANGAN VS SURENDRA SINGH & ORS.

2011 (12) SCC 773, 2011 (8) SCR 129 A combined reading of the several provisions of Order 22 of the Code makes the following position clear:

(a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be brought on record and proceed with the suit.

(b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.

(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

(d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependant upon any formal order of the court that the suit has abated.

(e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9 (2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative.

In the case of B.C. Harinarayanamma and others v. V. Narasimha and others (MANU/ AP/0413/2001 : 2001 (4) ALT

580), High Court held that in a suit for declaration of title and for recovery of possession of the suit land from the defendants, if the suit against one of the plaintiffs, who is a co-owner stands dismissed by abatement, due to the death of the said co-owner and if the suit is decreed for declaration of title and possession in favour of the surviving co-owners, it leads to conflict of judgments. The difficulty arises always when there is a joint decree.

In the case of Meka Chinnappa Reddy and another v. Meka Pulla Reddy MANU/ AP/0493/2000 : 2000 (4) ALT 562 : (2000 (4) ALD 492) the suit was for mere injunction on the ground that the defendants were trespassers and were interfering with the possession of plaintiffs. Even in the absence of legal representatives of one of the plaintiffs, the decree in favour of surviving plaintiff for injunction would not result in any conflict of decisions or contradictory findings. Further, such a decree cannot be said to be inexecutable.

In the case of Mohd. Safdar Shareef (died) per LRs v. Mohammed Ali (died) per LRs (MANU/AP/0288/1993 : 1993 (1) ALT 522) Court held that common decree for possession and profits is sought for against all the defendants. The decree in question is joint and indivisible. Even according to the written statement, the defendants contend that they are jointly in possession and enjoyment of 1932 square yards of site. Therefore, it is clear that any decree that may be passed against some of the defendants would be inconsistent with a decree of

dismissal of the suit in respect of other defendants. Ultimately, this High Court held that CCCA filed by the plaintiff has abated since legal representatives of the 2nd respondent were not brought on record.

Mahmud Mian (dead) through L.Rs. and another v. Shamsuddin Mian (dead) through L.Rs. and others ((2005) 11 SCC 582) wherein the apex Court held that in a suit for partition on account of death of one of the parties, the appeal could not have abated in its entirety.

Transferee treated as Legal Representative - In Mohammad Arif v. Allah Rabbul Alamin and others (MANU/SC/0007/1982 : AIR 1982 SC 948(1)) it was held in the second appeal itself that Mohammad Arif had been joined as a co-appellant along with his vendor Mohammad Ahmad. On the death of Mohammad Ahmed all that was required to be done was that the appellant who was on record should have been shown as legal representative inasmuch as he was the transferee of the property in question and at least as an intermeddler was entitled to be treated as legal representative of the Mohammed Ahmed. He being on record the estate of the deceased appellant qua the property in question was represented and there was no necessity for application for bringing the legal representatives of the deceased appellant on record.

In the case of T. Gnanavel v. T.S. Kanagaraj and another (MANU/SC/0291/2009 : 2009 (3) ALT 39 (SC)) the Apex Court

by judgment dated 25.2.2009 in Civil Appeal No. 1259 of 2009 held that the Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

In Sushil K. Chakravarty (D) through L.Rs. v. M/s. Tej Properties Pvt. Ltd. MANU/SC /0258/2013 : 2013 (4) ALT 2.2 (DN SC) held that it is open to the Court to exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

In the case of Mahabir Prasad v. Jage Ram (MANU/SC/0010/1971 : AIR 1971 SC 742) the apex Court held that under Order 41 Rule 4 CPC it is open to the appellate court when other persons who were parties to the proceeding before Subordinate Court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to appeal or are

impleaded as respondents. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed at the limitation act the proceedings will not abate.

In the case of Government of Andhra Pradesh v. Pratap Karan

{**MANU/SC/1139/2015** : 2016 (4) ALD 2 (SC)} the Apex Court held that indisputably all the plaintiffs had equal shares in the suit property left by their predecessors. Hence, in the event of death of any of the plaintiffs, the 14 estate is fully and substantially represented by the other sharers as owners of the suit property. Therefore, it is of the view that by reason of non-substitution of the legal representative(s) of the deceased plaintiffs, who died during the pendency of the appeal in the High Court, entire appeal shall not stand abated. Remaining sharers, having definite shares in the estate of the deceased, shall be entitled to proceed with the appeal without the appeal having been abated.

In the case of B. Ramachandra Reddy and others v. Nelli

Subbamma (MANU/AP/ 1162/2002 : 2003 (1) ALD 763) this High Court held that since the 1st appellant, as father of 2nd appellant was managing the estate of the 2nd appellant, he, for the purpose of Section 2(11) C.P.C., would be deemed to be a legal representative to the estate of the deceased-2nd appellant. It is well settled that when one of the legal representatives is already on record, the proceedings against a deceased party do not abate, and his other legal representatives, who also represent

his estate, can be brought on record or allowed to come on record at any time even beyond the period of limitation prescribed.

In the case of Chaganti Subbarao v. Thimmaraji Satyanarayana (MANU/AP/ 0979/2006 : 2007 (3) ALT 408)

High Court held that where several defendants are impleaded in a suit, the question whether the death of one of them, would bring about a total abatement, would depend upon the nature of cause of action, in the suit. If the cause of action is divisible, the abatement will be restricted to that portion of the claim, made against the deceased party, and the rest of the claim would survive. On the other hand, if the cause of action is indivisible, the entire suit would abate, if steps are not taken to bring the legal representatives, within the stipulated time.

In the case of Mohd. Kaleemullah v. Mohd. Azizullah and others (MANU/AP/0636/2005 : 2005 (6) ALD 303)

High Court held that whenever a party to the suit dies during the pendency of the proceedings, corresponding obligation is cast upon the parties concerned, to bring the legal representatives of the deceased party, on record. Failure to do so would entail in abatement of the suit. Sub-rule (4) of Rule 4 of Order XXII CPC enables the Court, to relieve the plaintiff in a suit, from the obligation to bring the legal representatives of the deceased defendant on record, in case, such defendant remained ex parte. The basis for such a course is that when the party did not choose to respond to the summons issued by the Court during his

lifetime, his estate cannot stand on a better footing, after his death.

In the case of Velamala Appa Rao v. Baggu Appayya (MANU/AP/0564/2005 : 2005 (5) ALT 695) this High Court held that Order 22 Rule 4 CPC discloses that the death of one of the defendants, ipso facto, does not result in abatement of the entire suit. Much would depend on the nature of reliefs claimed against them and the severability of the cause of action. Sub-rule (1) thereof, discloses that the abatement would result if only the right to sue survives, vis-a-vis the dead person. Sub-rule (3) mandates that, where no steps are taken to bring the legal representatives on record, the suit shall abate against the deceased-defendant.

In the case of Gema Coutinho Rodrigues v. Bricio Francisco Pereira (MANU/SC/ 0263/1994 : AIR 1994 SC 1199) the Apex Court held that so long as one of the heirs has been brought on record, substantially representing estate of the deceased plaintiff, application would not be dismissed on the ground that the suit has abated or it could not proceed.

In the case of Newanness v. Shaikh Mohamad (MANU/SC/0183/1996 : 1995 Supp (2) SCC 529) the Apex Court held that since the 3rd defendant is already on record representing all the heirs of the first defendant widow, the question of abatement does not arise.

In the case of Sahdeo Singh v. Ramchhabila Singh (MANU/BH/0059/1978 : AIR 1978 Patna 258) the Patna High Court held that where during pendency of a suit by co-owners for declaration of title and possession against trespassers one of the co-owners dies the suit will not abate for non-substitution of his legal representatives for the reason that the suit is maintainable even by some of the co-owners.

**LEGAL PROCEEDINGS BY OR AGAINST REPRESENTATIVES
OF THE PARTIES TO A DISPUTE**

Ramachandra vs Laxmana Rao AIR 2000 Kant 298, ILR 2000 KAR 2341, Section 146 of the CPC. This provision reads: "146. Proceedings by or against representatives.--Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him". On an analytical reading of Section 146, one legal position which clearly emerges is that where any legal proceeding may be taken or an application for a legal proceeding may be made by or against any person, then, that proceeding may also be taken or application for the same may be made by or against any persons claiming under him. This provision deals with legal proceedings by or against representatives of the parties to a dispute or to a decree or final order of any competent Court. Its operation is general in nature, except that it is circumscribed by the beginning saving clause "save as otherwise provided by this Code or any law for the time being in force".

Jugalkishore Saraf v Raw Cotton Company Limited, AIR 1955 SC 376 has, in regard to the curtailing effect of this saving clause on the scope of Section 146, said: "The effect of the expression "save as otherwise provided in this Code" contained in Section 146 is that a person cannot make an application under Section 146 if other provisions of the Code are applicable to it".

Jaladi Suguna (Deceased) through LRs. v. Satya Sai Central Trust and Ors. MANU/SC/7614/2008 : (2008) 8 SCC 521,

Court held that the determination as to who is the legal representative Under Order XXII Rule 5 of the Code is for the limited purpose of representation of the estate of the deceased and for adjudication of that case. This Court held as under:

..... Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, can it be said that the estate of the deceased is represented. The determination as to who is the legal representative Under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject-matter of the suit, vis-à-vis other rival claimants to the estate of the deceased.

Suresh Kumar Bansal v. Krishna Bansal and Anr.
MANU/SC/1891/2009 : (2010) 2 SCC 162, this Court held as under: It is now well settled that determination of the question as to who is the legal representative of the deceased Plaintiff or Defendant Under Order 22 Rule 5 of the Code of Civil Procedure is only for the purpose of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.

Court in Daya Ram and Ors. v. Shyam Sundari and Ors.
MANU/SC/0298/1964 : AIR 1965 SC 1049 wherein it was held that impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record will bind not merely those impleaded but the entire estate, including those not brought on record.

INTER SE DISPUTE BETWEEN THE RIVAL LEGAL REPRESENTATIVES HAS TO BE INDEPENDENTLY TRIED AND DECIDED IN SEPARATE PROCEEDINGS

Dashrath Rao Kate v. Brij Mohan Srivastava
MANU/SC/1782/2009 : (2010) 1 SCC 277. In the said case,

the High Court came to the conclusion that since the inquiry Under Order XXII Rule 5 of the Code was of a summary nature, it was limited only to the determination of the right of the Appellant therein to be impleaded as the legal representative. This Court in the said case held as under:

21. As a legal position, it cannot be disputed that normally, an enquiry Under Order 22 Rule 5 Code of Civil Procedure is of a summary nature and findings therein cannot amount to res judicata, however, that legal position is true only in respect of those parties, who set up a rival claim against the legatee. For example, here, there were two other persons, they being Ramesh and Arun Kate, who were joined in the civil revision as the legal representatives of Sukhiabai. The finding on the will in the order dated 9-9-1997 passed by the trial court could not become final as against them or for that matter, anybody else, claiming a rival title to the property vis-à-vis the Appellant herein, and therefore, to that extent the observations of the High Court are correct. However, it could not be expected that when the question regarding the will was gone into in a detailed enquiry, where the evidence was recorded not only of the Appellant, but also of the attesting witness of the will and where these witnesses were thoroughly cross-examined and where the Defendant also examined himself and tried to prove that the will was a false document and it was held that he had utterly failed in proving that the document was false, particularly because the document was fully proved by the Appellant and his attesting witness, it would be futile to expect the witness to lead that evidence again in the main suit.

25. Dr. Kailash Chand, learned Counsel appearing for the Respondent, also relied on ruling in Vijayalakshmi Jayaram v. M.R. Parasuram [MANU/AP/0063/1995 : AIR 1995 AP 351]. It is correctly held by the Andhra Pradesh High Court that Order 22 Rule 5 is only for the purpose of bringing legal representatives on record for conducting of proceedings in which they are to be brought on record and it does not operate as res judicata. However, the High Court further correctly reiterated the legal position that the inter se dispute between the rival legal representatives has to be independently tried and decided in separate proceedings. Here, there was no question of any rivalry between the legal representatives or anybody claiming any rival title against the Appellant-Plaintiff. Therefore, there was no question of the Appellant-Plaintiff proving the will all over again in the same suit.

26. The other judgment relied upon is the Full Bench judgment of the Punjab and Haryana High Court in Mohinder Kaur v. Piara Singh [MANU/PH/0197/1981 : AIR 1981 P & H 130]. The same view was reiterated. As we have already pointed out, there is no question of finding fault with the view expressed. However, in the peculiar facts and circumstances of this case, there will be no question of non-suiting the Appellant-Plaintiff, particularly because in the same suit, there would be no question of repeating the evidence, particularly when he had asserted that he had become owner on the basis of the will.

The Full Bench of the Punjab & Haryana High Court in a judgment reported as Mohinder Kaur and Anr. v. Piara Singh

and Ors. MANU/PH/0197/1981 : AIR 1981 P & H 130

examined the question as to whether a decision Under Order XXII Rule 5 of the Code would act as res judicata in a subsequent suit between the same parties or persons claiming through them. The Court held as under:

So far as the first argument of Mr. Bindra, noticed above is concerned, we find that in addition to the judgments of the Lahore High Court and of this Court, referred to in the earlier part of this judgment, he is supported by a string of judgments of other High Courts as well wherein it has repeatedly been held on varied reasons, that, a decision Under Order 22, Rule 5, Code of Civil Procedure, would not operate as res judicata in a subsequent suit between the same parties or persons claiming through them wherein the question of succession or heirship to the deceased party in the earlier proceedings is directly raised. Some of these reasons are as follows:

- (i) Such a decision is not on an issue arising in the suit itself, but is really a matter collateral to the suit and has to be decided before the suit itself can be proceeded with. The decision does not lead to the determination of any issue in the suit.
- (ii) The legal representative is appointed for orderly conduct of the suit only. Such a decision could not take away, for all times to come, the rights of a rightful heir of the deceased in all matters.
- (iii) The decision is the result of a summary enquiry against which no appeal has been provided for.
- (iv) The concepts of legal representative and heirship of a deceased party are entirely different. In order to constitute one as a legal representative, it is unnecessary that he should have a

beneficial interest in the estate. The executors and administrators are legal representatives though they may have no beneficial interest. Trespasser into the property of the deceased claiming title in himself independently of the deceased will not be a legal representative. On the other hand the heirs on whom beneficial interest devolved under the law whether statute or other, governing the parties will be legal representatives.....

9. We are, therefore, of the opinion that in essence a decision Under Order 22, Rule 5, Code of Civil Procedure, is only directed to answers an orderly conduct of the proceedings with a view to avoid the delay in the final decision of the suit till the persons claiming to be the representatives of the deceased party get the question of succession settled through a different suit and such a decision does not put an end to the litigation in that regard. It also does not determine any of the issues in controversy in the suit. Besides this it is obvious that such a proceeding is of a very summary nature against the result of which no appeal is provided for. The grant of an opportunity to lead some sort of evidence in support of the claim of being a legal representative of the deceased party would not in any manner change the nature of the proceedings. In the instant case the brevity of the order (reproduced above) with which the report submitted by the trial Court after enquiry into the matter was accepted, is a clear pointer to the fact that the proceedings resorted to were treated to be of a very summary nature. It is thus manifest that the Code of Civil Procedure proceeds upon the view of not imparting any finality to the determination of the question of succession or heirship of the deceased party.

Varadarajan vs. Kanakavalli and Ors. : MANU/SC/0070/2020

- The Appellant claims to be the legal representative of deceased on the basis of the Will executed by her. He had produced an attesting witness and the scribe of the Will. The witnesses had deposed the execution of the Will by deceased in favour of the Appellant who was the son of her sister. No one else had come forward to seek execution of decree as the legal representative of the deceased decree holder. It was deceased who had filed the execution petition but after her death, the Appellant had filed an application to continue with the execution. In the absence of any rival claimant claiming to be the legal representative of the deceased decree holder, the High Court was not justified in setting aside the order of the Executing Court, when in terms of Order 22 Rule 5 of the Code, the jurisdiction to determine who was a legal heir was summary in nature.

WHO IS INTERESTED PARTY IN A DISPUTE

In Maharaj Singh v, State of U.P., 1976 AIR 2602, 1977 SCR (1)1072, the question that arose for consideration was as to

whether the State which was not a party to the suit could maintain an appeal under S. 96, C.P.C. It was held that where a wrong against community interest was done, 'no locus standi' will not always be a plea to non-suit an interested body chasing the wrong-doer in court. The Government was held to be a 'person aggrieved' as it had a right of resumption front the Gaon Sabha meant to be exercised in public interest and its right of resumption, would be seriously jeopardised if the estate were to slip into the hands of the trespasser is as much as the estate belonged to the State it was vested in Goan Sabha by the State for community benefit. In this decision while considering the question as to who can be considered to be an 'aggrieved person' it is held that a person who has a proprietary right which has been or is threatened to be violated is highly aggrieved person. It is also further held that a legal injury creates a remedial right in the injured person and the nexus between the lis and the plaintiff need not necessarily be personal although it has to be more than a wayfarer's allergy to an unpalatable episode. In this decision, the wider proposition of law as to who is a 'person aggrieved' made by the Supreme Court in Dabholkar's case has been approved. In Dabholkar's case, it is held by the Supreme Court that "the test is whether the words 'person aggrieved' include a person who has a genuine grievance because an order has been made which prejudicially affects his interests." In that case, the Supreme Court has also further approved the following enunciation made by Lord Denning in *Att. Geri of Gambia v. Peirra Serr N'Jie* (1961) AC 617: "..... The words 'person aggrieved' are of wide import and should not be subjected to a

restrictive interpretation. They do not include of course, a mere busybody who is interfering in things which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

Subbanna Vs Kamaiah reported in ILR KAR 1988(2) 786 has specifically held that that Rule 9 of Order 1 of C.P.C. specifically provides that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties and therefore the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. Sub- rule (2) of Rule 10 of Order 1 C.P.C., empowers the Court to direct the plaintiff to add a person to the suit who ought to have joined whether as plaintiff or defendant whose presence before the Court is necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit.

PRINCIPLES IMPLEADING PARTIES TO SUIT

In the case of Vidur Impex and Traders Pvt. Ltd. and Ors. v. Tosh Apartments Pvt. Ltd. and Ors. MANU/SC/0663/2012 - AIR 2012 SC 2925, it was observed that: "The broad principles for impleading of parties are as under:

"1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for

effective and complete adjudication of the issues involved in the suit.

2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by Court.

3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

5. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above-board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment".

Bhavya Dwellings Pvt. Ltd. vs. Gopal Narain Chaubey and Ors.: MANU/UP/0403/2014 - Order I, Rule 10(2), C.P.C. reads as under:- Court may strike out or add parties.--The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to

the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be Struck out, and that the name, of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

40. From the perusal of Order I, Rule 10(2), C.P.C. it covers two types of cases:

- (a) of a party who ought to have been joined but not joined and is a necessary party, and
- (b) of a party without whose presence the question involved in the case cannot be completely decided.

41. The former is called a necessary party and the latter a proper party. Sub-rule (2) of Order I, Rule 10, therefore, is attracted when the question is covered by one of the above. A party seeking such a joinder as a proper party will have to prima facie establish that such a party has interest in the subject-matter of the litigation and as such should be before the Court.

42. The simple test in such controversy would be as to whether the presence of such a party is appropriate in view of the subject-matter in adjudication. If the answer be in the affirmative, joinder can be permitted. By reason of direct interest in the subject-matter or even by reason of eventual reliefs sought, such a test would be answered. Power being there, it is all a matter of appreciation of the controversy in issue and its possible ramifications.

43. Order I, Rule 10(2), C.P. Code gives a very wide discretion to the Court to deal with any such situation which may result in prejudicing the interest of affected party if not impleaded in the suit and where the impleadment of the said party is necessary and vital for the decision of the suit. It is true that the discretion has to be exercised judicially but at the same time the concerned Civil or Appellate Court where the suit on appeal is pending has also to take into consideration that the party which is necessary to be impleaded will be put to a greater difficulty if not impleaded by the plaintiff who may have ulterior motives of not impleading such party and if the decision is given which may affect the interest of the said party greater prejudice would be caused to the said party as a result of not impleading while no prejudice or loss would be caused to the plaintiff because he will have full opportunity to defend his rights and interest as against aggrieved party who has been impleaded as a party to the suit.

45. The expression "to settle all questions involved" used in Order I, Rule 10(2), is susceptible of liberal and wide interpretation so as to adjudicate all the questions pertaining to the subject-matter thereof.

49. Under Order I, Rule 10(2), C.P.C. the power to add a party to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right.

The important aspect which should be looked into by the Civil Courts while deciding the applications under Order I, Rule 10(2), C.P. Code is to avoid multiplicity of litigation and also conflicting decisions being passed in different suits which will be safeguarded as a result of allowing necessary party to be impleaded in the suit **(See Baijnath v. Ganga Devi MANU/RH/0213/1998 : AIR 1998 Raj. 125).**

The Parliament in its wisdom while framing this rule must have thought that all the material questions common to the parties to the suit and to the third parties should be tried once for all and the Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties **(See Abdul Jaleel v. Aishabi MANU/KA/0057/1992 : AIR 1992 Karn. 380).**

The word "At any stage" in Order I, Rule 10(2), C.P.C. means that there is no requirement of law that an application for addition of a party as defendant must be made at any particular stage of the trial though in a given case delay in moving an application might be one of the considerations for the decision **(See. Gurmmuj Saran v. Joyce C. Salim MANU/DE/0002/1990 : AIR 1990 Del. 13 (D.B.).**

The use of the expression "at any stage of proceedings" in Order I, Rule 10(2) shows that the power vested in the Court under it can be exercised only when the proceedings before it are alive and still pending. Once the adjudication itself of all the disputes in the case is over, this provision cannot be made use of by any party **(See Sardar Ali Khan v. Special Deputy Collector MANU/AP/0040/1973 : AIR 1973 AP 298 (D.B.).**

Order I, Rule 10(2) empowers the Court to implead any person as party suo motu, who ought to have been joined, whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. True, the plaintiff is dominus litis, but a Court has to guard against the obtaining of a collusive decree against the real owner or interested person without impleading him as a party and to see that such a decree does not become final affecting vitally the rights of such person. Therefore, to avoid such a situation and also to avoid multiplicity of proceedings, a Court should permit such a person to be added as a party **(See Kamta Prasad v. Vidyawati MANU/MP/0038/1994 : AIR 1994 MP 181).**

In the case of Savinder Singh v. Dalip Singh MANU/SC/1212/1996 : (1996) 5 SCC 539, Hon'ble the Apex Court held as under:- It would, therefore, be clear that the defendants in the suit were prohibited by operation of section 52 to deal with the property and could not transfer or otherwise deal

with it in any way affecting the rights of the appellant except with the order or authority of the Court, Admittedly, the authority or order of the Court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lie pendens by operation of section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit.

In the case of Savitri Devi v. District Judge, Gorakhpur 1999 (36) ALR 93 (SC), Hon'ble Supreme Court after considering the provisions of Order I, Rule 10, C.P.C. and the law on the point in issue as laid down in the cases of Khemchand Shankar Choudhari and another v. Vishnu Hari Patil and others 1999 (36) ALR 93 (SC), Ramesh Hirachand Kundanmal v. Municipal Corpn. Of Greater Bombay MANU/SC/0493/1992 : 1992 (2) SCC 524 held as under: Order I, Rule 10, C.P.C. enables the Court to add any person as party at any stage of the proceedings if the person whose presence before the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision in the Code.

In Khemchand Shankar Choudhari and another v. Vishnu Hari Patil and others MANU/SC/0168/1982 : (1983) 1 SCR 898 Court held that a transferee pendente lite of an interest in an immovable property which is the subject-matter of suit is a representative in interest of the party from whom he has acquired

that interest and has a right to be impleaded as a party to the proceedings. The Court has taken note of the provisions of section 52 of the Transfer of Property Act as well as the provisions of Rule 10 of Order XXII, C.P.C. The Court said: ...It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard he has got to be so impleaded and heard....

In Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and others MANU/SC/0493/1992 : (1992)

2 SCR 1 Court discussed the matter at length and held that though the plaintiff is a 'dominus litis' and not bound to sue every possible adverse claimant in the same suit, the Court may at any stage of the suit direct addition of parties and generally it is a matter of judicial discretion which is to be exercised in view of the facts and circumstances of a particular case. The Court said: The case really turns on the true construction of the rule in particular the meaning of the words "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

The Court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct, the addition of a person whose presence is not necessary for that purpose. If the intervener has a cause of action against the plaintiff relating to the subject-matter of the existing action, the Court has power to join the intervener so as to give effect to

the primary object of the order which is to avoid multiplicity of actions.

The Court also observed that though prevention of actions cannot be said to be main object of the rule, it is a desirable consequence of the rule. The test for impleading parties prescribed in *Razia Begum v. Anwar Begum* MANU/SC/0003/1958 : (1959)1 SCR 111 that the person concerned must be having a direct interest in the action was reiterated by the Bench.

In the case of Amit Kumar Shaw v. Farida Khatoon MANU/SC/0284/2005 : 2005 (59) ALR 584 (SC), Hon'ble the Supreme Court has held that a transferee pendente lite can be added as a proper party if his interest in the subject-matter of suit is substantial and not just peripheral. The relevant paragraph 16 of the said judgment reads as under: The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant, the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a

party; under Order XXII, Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interest.

In the case of **Amit Kumar Shaw v. Farida Khatoon** **MANU/SC/0284/2005 : 2005 (59) ALR 584 (SC)**, Hon'ble the Supreme Court has referred to the provision of Order I, Rule 10(2) and Order XXII, Rule 10, C.P.C. as also section 52 of the Act, and observed as under:

15. Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced. It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens, the following elements must be present:

1. There must be a suit or proceeding pending in a Court of competent jurisdiction.
2. The suit or proceeding must not be collusive.
3. The litigation must be one in which right to immovable property is directly and specifically in question.
4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.

5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order."

6. The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee, pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order XXII, Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests.

In the case of Dhanlakshmi and others v. P. Mohan and others MANU/SC/7041/2007 : 2007 (67) ALR 492 (SC), relevant paragraph quoted as under: Section 52 deals with a transfer of property pending suit. In the instant case, the appellants have admittedly purchased the undivided shares of the respondents Nos. 2, 3, 4 and 6. It is not in dispute that the first respondent P. Mohan has got an undivided share in the said suit property. Because of the purchase by the appellants of the

undivided share in the suit property, the rights of the first respondent herein in the suit or proceeding will not affect his right in the suit property by enforcing a partition. Admittedly, the appellants, having purchased the property from the other co-sharers, in our opinion, are entitled to come on record in order to work out the equity in their favour in the final decree proceedings. In our opinion, the appellants are necessary and proper parties to the suit, which is now pending before the Trial Court. We also make it clear that we are not concerned with the other suit filed by the mortgagee in these proceedings.

Vidur Impex and Traders Pvt. Ltd. and Ors. vs. Tosh Apartments Pvt. Ltd. and Ors.: MANU/SC/ 0663/2012

Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as Plaintiff or Defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.
2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.
3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all

matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the Plaintiff.

5. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment.

Adv - Sridhara babu N

CHAPTER
BENAMI TRANSACTIONS

HOW TO DETERMINE NATURE OF TRANSACTION

Hon'ble Supreme Court in the case of **Om Prakash Sharma alias O.P. Joshi v. Rajendra Prasad Shewda & Ors., reported in MANU/SC/1137/2015 : (2015) 15 SCC 556** - Paragraphs 11 and 13 of the said judgment are quoted herein below: "11. The "other" relevant circumstances that should go into the process of determination of the nature of transaction can be found in *Jaydayal Poddar v. Bibi Hazra* AIR 1974 SC 171, which may be usefully extracted below: "6. It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can

be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title deeds after the sale; and (6) the conduct of the parties concerned in dealing with the property after the sale.

7. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1 viz. the source, whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.".....

13. Applying the aforesaid principles to the facts of the present case we find that the High Court was perfectly justified in coming to the conclusion that the property though purchased from the funds of Jagannath Joshi was really for the benefit of his widow Moni Debi and therefore Moni Debi was the real owner of the property. In this regard, the entries of the name of Moni Debi in the Municipal and Land Revenue records; the fact that the brothers of Jagannath Joshi were no longer alive (according to the plaintiff the property was purchased by Jagannath Joshi in the name of his wife to protect the same from his brothers) are relevant facts that have been rightly taken into account by the High Court. The fact that the property was managed by Jagannath Joshi which fact accords with the practice prevailing

in a Hindu family where the husband normally looks after and manages the property of the wife, is another relevant circumstance that was taken note of by the High Court to come to the conclusion that all the said established facts are wholly consistent with the ownership of the property by Moni Debi."

BURDEN OF PROOF REGARDING BENAMI TRANSACTIONS

Hon'ble Supreme Court in the case of **Binapani Paul v. Pratima Ghosh & Ors., reported in MANU/SC/ 2428/2007: (2007) 6 SCC 100**. Paragraph 47 of the aforesaid judgment is quoted herein below: "47. Burden of proof as regards the benami nature of transaction was also on the respondent. This aspect of the matter has been considered by this Court in Valliammal v. Subramaniam (2004) 7 SCC 233 wherein a Division Bench of this Court held: "13. This Court in a number of judgments has held that it is well established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami. The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. Refer to Jaydayal Poddar v. Bibi Hazra, Krishnanand Agnihotri v. State of M.P., Thakur Bhim Singh v. Thakur Kan Singh, Pratap Singh v. Sarojini Devi, and Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah. It has

been held in the judgments referred to above that the question whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transaction:

- (1) the source from which the purchase money came;
- (2) the nature and possession of the property, after the purchase;
- (3) motive, if any, for giving the transaction a benami colour;
- (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
- (5) the custody of the title deeds after the sale; and
- (6) the conduct of the parties concerned in dealing with the property after the sale.' (Jaydayal Poddar v. Bibi Hazra AIR 1974 SC 171),

14. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia.

18. It is well settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami. The evidence shows clearly that the original plaintiff did not have any justification for

purchasing the property in the name of Ramayee Ammal. The reason given by him is not at all acceptable. The source of money is not at all traceable to the plaintiff. No person named in the plaint or anyone else was examined as a witness. The failure of the plaintiff to examine the relevant witnesses completely demolishes his case."

CHAPTER MISCELLANIOUS

CASTE AND RELIGION WHAT COURTS SAY

Valsamma Paul v. Cochin University and others, (1996) 3 SCC 545 (Paras 33 and 34) : Hon'ble the Supreme Court held that a candidate who had the advantageous start in life, being born in Forward Caste, and had march of advantageous life but is transplanted in Backward Caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution.

Lily Thomas and others v. Union of India and others, (2000) 6 SCC 224 (Para 38) : Hon'ble the Supreme Court in this case held that religion is a matter of faith stemming from the depth of the heart and mind. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited.

Satrucharla Vijay Rama Raju v. Nimmaka Jaya Raju, (2006) 1 SCC 212 : Hon'ble the Supreme Court held that a person seeking election from a reserved constituency must be a true representative of that reserved community. On the basis of the material available, it was further held that the appellant could not be considered to be a true representative of a tribe included in the Presidential Order deserving special protection.

Lilly Kutty v. Scrutiny Committee, SC & ST and others, (2005) 8 SCC 283 : Hon'ble the Supreme Court held that caste scrutiny committee, on the basis of expert agency report and relevant record, recorded a finding that the appellant was not belonging to Hindu Pulayan Scheduled Caste and the certificate was obtained fraudulently by misrepresentation of facts with a

view to obtain benefit as Scheduled Caste. The decision of cancelling the caste certificate was held justified.

K.P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate (Civil Appeal No. 7065 of 2008, decided on 26.2.2015) (SC) : In para 34 of the judgment, it was held that three things need to be established by a person who claims to be a beneficiary of the caste certificate are:

- (i) there must be absolutely clear cut proof that he belongs to the caste that has been recognised by the 1950 Order;
- (ii) there has been reconversion to the original religion to which the parents and earlier generations had belonged; and
- (iii) there has to be evidence establishing the acceptance by the community.

Each aspect is very significant, and if one is not substantiated, the recognition would not be possible.

Pritam Dass Mahant v. Shiromani Gurdwara Prabandhak Committee, (1984) 2 SCC 600 (Para 21):

Hon'ble the Supreme Court held that Udasis are not Sikhs for the purposes of Sikh Gurdwara Act. No reconciliation between the Sikhs and the Udasis ever took place. The Udasis are not

Sikhs, but schismatics who separated in the earliest days of Sikhism and never merged with the followers of the Gurus.

Shiromani Gurdwara Prabhandhak Committee, Amritsar v. Mahant Kirpa Ram and others, (1984) 2 SCC 614 (Para 19) :

In this case it was held that Udasis form an independent sect. They are midway between Sikhs on the one hand and Hindus on the other. In an institution of Udasi Sect, one can visualise reading of Granth Sahib or veneration of Sikh scriptures. But that itself is not decisive of the character of the institution. On the contrary, if the succession was from guru to chela and those gurus were followers of Udasi faith and the institution was known as Dera of Udasi Bhekh and they followed some of the practices of Hindu traditional religion that would be completely destructive of the character of the institution as a Sikh Gurdwara.

I.S. Anbalagan v. B. Devarajan and others, AIR 1984 SC 411 :

In this case, the first respondent was elected to the Lok Sabha from a constituency which was reserved for the Scheduled Castes. The appellant challenged the election of the first respondent on the ground that he was not a member of the Scheduled Castes. The election Tribunal found that the first respondent belonged to the Scheduled Caste and upheld the election. Hence, appeal was filed. The appellant urged before Hon'ble the Supreme Court that the parents and the sisters of the respondent were shown to be Christians and the respondent

was born a Christian and there was no way he could acquire a caste and become an Adi Dravida on conversion to Hinduism.

Kailash Sonkar v. Smt. Maya Devi, AIR 1984 SC 600: The questions that came up for consideration before Hon'ble the Supreme Court in this case were:

- (i) as to what happens if a member of the scheduled caste or scheduled tribe leaves his present fold, namely Hinduism and embraces Christianity or Islam?
- (ii) as to whether it would amount to a complete loss of the original caste, to which, he belonged for ever? and
- (iii) as to whether there would be revival of the original caste, if he or his children subsequently choose to abjure the new religion and get re-converted to the old religion ?

The Supreme Court posed the following questions to itself :

- (i) is membership in a caste or tribe to be determined solely by birth or by allegiance or by the opinion of its members or of the neighbourhood ? and
- (ii) does one lose his caste on conversion or by ex-communication ?

After analyzing the import of various decisions, the Supreme Court held that "the caste to which a Hindu belongs, is essentially determined by birth and that if a Hindu is converted

to Christianity or another religion, which does not recognise caste, the conversion amounts to a loss of the said caste."

It was further held that "In our opinion, when a person is converted to Christianity or some other religion, the original caste remains under eclipse and as soon as during his/her life time, the person is reconverted to the original religion, the eclipse disappears and the caste automatically revives."

Punjabrao v. Dr. D.P. Meshram and others, AIR 1965 SC 1179

: Hon'ble the Supreme Court observed that clause (3) of the 1950 Order, contemplates that for a person to be treated as one belonging to a Scheduled Caste within the meaning of that order he must be one who professes either Hindu or Sikh religion. After referring to the meaning of the word "profess", as given in Webster's New World Dictionary and Shorter Oxford Dictionary, it was held that "a declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. Therefore, if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration, it would be idle to enquire further as to whether the conversion to another religion was efficacious. The word "profess" in the Presidential Order appears to have been used in the sense of an open declaration or practice by a person of the Hindu (or the Sikh) religion. Where, therefore, a person say, on the contrary that he has ceased to be a Hindu he cannot derive any benefit from that Order."

V. Ganpat v. Presiding Officer and others, AIR 1975 SC 420:

In this case, the main plank of challenge was that the elected candidate was not a member of a Scheduled Caste as he had ceased to be a Hindu and had become a Buddhist. There was failure to raise such an objection at the time of scrutiny of nomination papers. It was held that though there is no bar to raise the question in the election petition questioning the election of the elected candidate that he was not a member of the Scheduled Caste, but such failure would considerably weaken the objection.

Division Bench judgment of Hon'ble Madras High Court in the matter of G. Michael v. S. Venkateswaran, AIR 1952 Mad. 474,

would reveal that the general rule is that conversion operates as an expulsion from caste; in other words, a convert ceases to have any caste. Para 17 of the judgment is reproduced as under:- "17. Christianity and Islam are religions prevalent not only in India but also in other countries in the world. We know that in other countries these religions do not recognise a system of castes as an integral part of their creed or tenets. Is it different in India? Mr. Venkatasubramania Aiyar frankly confessed that so far as Islam is concerned there is no question that it does not tolerate any difference based on caste distinction. A member of one of the castes of sub-castes when he is converted to Islam ceases to be a member of any caste. He becomes just a Mussalman and his place in Muslim society is not determined by the caste to which he belonged before his conversion. Learned

counsel also conceded that generally this is so even when there has been a conversion to Christianity. But he said that there were several cases in which a member of one of the lower castes who has been converted . to Christianity has continued not only to consider himself as still being a member of the caste, but has also been considered so by other members of the caste who had not been converted. I am prepared to accept that instances can be found in which in spite of conversion, the caste distinctions might continue. This is somewhat analogous to cases in which even after conversion certain families and groups continue to be governed by the law by which they were' governed before they became converts. But these are all cases of exception and the general rule is conversion operates as an expulsion from the caste; in other words, a convert ceases to have any caste."

The Nagpur Bench (Division Bench) of Hon'ble Bombay High Court in the matter of *Sadique Hussain Sheikh Azim Qureshi v. Divisional Caste Certificate Scrutiny Committee and another*, 2012 (2) BCR 799, held that the petitioner, who was a Muslim by religion, cannot claim to be a member of Scheduled Caste.

Constitution Bench in the case of The Principal Guntur Medical College, Guntur & Ors. v. Y. Mohan Rao (1976) 3 SCC 411, inasmuch as it has ruled that benefit available to a Scheduled Caste can only be made available to a person, if his parents were converted to Christianity and he has been reconverted and further satisfies other conditions like following the customs and traditions of the Caste after reconversion but

would not be applicable to a person if his grandparents had converted to Christianity.

Court has held in Kailash Sonkar v. Smt. Maya Devi [(1984) 2 SCC 91] that a member of the Scheduled Caste, who is converted into Christianity and after she attains the age of discretion, can decide of her own volition to re-embrace Hinduism.

Perumal Nadar (dead) by LRs. v. Ponnuswami [1970 (1) SCC 605] this Court has held that a mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism but a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion and no formal ceremony of purification or expiation is necessary to effectuate conversion.

Court in C.M. Arumugam v. S. Rajgopal and others [(1976) 1 SCC 863] Court considered whether in fact S. Rajgopal was accepted as a member of Adi Dravida caste after his reconversion to Hinduism and after considering the various circumstances detailed in para 18 of the judgment as reported in the SCC came to the conclusion that after his reconversion to Hinduism, S. Rajgopal was recognized and accepted as a member of Adi Dravida caste by the other members of that community.

Two-Judge Bench decision in Kodikunnil Suresh @ J. Monian v. N.S. Saji Kumar & Ors. (2011) 6 SCC 430. According to us, the appellant was required to plead and lead evidence that he was a member of the Cheramar caste and after his reconversion he was accepted by the members of the Cheramar caste. So long as he has pleaded and adduced reliable evidence to show that he was originally a member of the Cheramar caste and after his conversion has been accepted back as a member of the Cheramar caste, the court cannot throw out his case only on the ground that he, like the Returning Officer, did not know the thin distinction between the Cheramar and Pulayan castes. The findings of the High Court, therefore, that there was no acceptable evidence to prove that the appellant was accepted as a member of the Cheramar caste after his reconversion to Hinduism was contrary to the evidence on record.

Court in C.M. Arumugam v. S. Rajgopal and others [(1976) 1 SCC 863] "It is no doubt true, and there we agree with the Madras High Court in G. Michael case that the general rule is that conversion operates as an expulsion from the caste, or, in other words, the convert ceases to have any caste, because caste is predominantly a feature of Hindu society and ordinarily a person who ceases to be a Hindu would not be regarded by the other members of the caste as belonging to their fold. But ultimately it must depend on the structure of the caste and its rules and regulations whether a person would cease to belong to the caste on his abjuring Hinduism. If the structure of the caste is such that its members must necessarily belong to Hindu

religion, a member, who ceases to be a Hindu, would go out of the caste, because no non-Hindu can be in the caste according to its rules and regulations. Where, on the other hand, having regard to its structure, as it has evolved over the years, a caste may consist not only of persons professing Hindu religion but also persons professing some other religion as well, conversion from Hinduism to that other religion may not involve loss of caste, because even persons professing such other religion can be members of the caste. This might happen where caste is based on economic or occupational characteristics and not on religious identity or the cohesion of the caste as a social group is so strong that conversion into another religion does not operate to snap the bond between the convert and the social group. This is indeed not an infrequent phenomenon in South India where, in some of the castes, even after conversion to Christianity, a person is regarded as continuing to belong to the caste. When an argument was advanced before the Madras High Court in G. Michael case "that there were several cases in which a member of one of the lower castes who has been converted to Christianity has continued not only to consider himself as still being a member of the caste, but has also been considered so by other members of the caste who had not been converted", Rajamannar, C.J., who, it can safely be presumed, was familiar with the customs and practices prevalent in South India, accepted the position "that instances can be found in which in spite of conversion the caste distinctions might continue", though he treated them as exceptions to the general rule."

Three- Judge Bench decision in Kailash Sonkar V. Maya Devi (1984) 2 SCC 91. In the said case, the Court posed the issue thus: "The knotty and difficult, puzzling and intricate issue with which we are faced is, to put it shortly, "what happens if a member of a scheduled caste or tribe leaves his present fold (Hinduism) and embraces Christianity or Islam or any other religion" - does this amount to a complete loss of the original caste to which he belonged for ever and, if so, if he or his children choose to abjure the new religion and get reconverted to the old religion after performing the necessary rites and ceremonies, could the original caste revive? The serious question posed here arose and has formed the subject-matter of a large catena of decisions starting from the year 1861, traversing a period of about a century and a half, and culminating in a decision of this Court in the case of G.M. Arumugam v. S. Rajagopal."

In Puneet Rai v. Dinesh Chaudhary , S.B. Sinha, J. (2003) 8 SCC 204 in his concurring opinion has observed thus: "30. In Caste and the Law in India by Justice S.B. Wad at p. 30 under the heading "Sociological Implications", it is stated: "Traditionally, a person belongs to a caste in which he is born. The caste of the parents determines his caste but in case of reconversion a person has the liberty to renounce his casteless status and voluntarily accept his original caste. His caste status at birth is not immutable. Change of religion does not necessarily mean loss of caste. If the original caste does not positively disapprove, the acceptance of the caste can be presumed. Such acceptance can also be presumed if he is elected by a majority to a reserved seat.

Although it appears that some dent is made in the classical concept of caste, it may be noticed that the principle that caste is created by birth is not dethroned. There is also a judicial recognition of caste autonomy including the right to outcaste a person."

HATE SPEECH

The Supreme Court in **Pravasi Bhalai Sangathan v. Union of India and ors., reported in AIR 2014 SC 1591**, while hearing a plea urged in public interest that the existing laws of the country are not sufficient to cope with the menace of "hate speeches", had the occasion to consider what a "hate speech" is. I may quote the relevant passage hereunder: "7. Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a social impact. Hate speech lays the ground-work for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."

PROOF THAT A PERSON SHOWN THAT THE LIFE OF A SANYASI

In Krishna Singh v. Mathura Ahir, AIR 1980 SC 707 Hon'ble Supreme Court held that "In order to prove that a person shown that the life of a sanyasi, it must be shown that he has actually relinquished and abandoned all worldly possessions and relinquished all desires for them or that such ceremonies are performed which indicate severance of his natural family and his secular life. It must also be proved, in case of orthodox sanyasi that necessary ceremonies have been performed, such as Pindadans or Birajohoma or Prajapathyesthi without which the renunciation will not be complete."

AVADHESH KUMAR VS. SHEO SHANKAR reported in AIR 1985 Allahabad 104 wherein Head Note 'A' reads as hereunder: "(A) Hindu Law - Person becoming Sanyasi - Proof - Modes. (Evidence Act (1 of 1872) S.3). Two modes have been provided for the proof that a person has adopted the life of a sanyasi. The first mode is that it must be shown that he has actually relinquished and abandoned all worldly possessions and relinquished all desire for them. The second mode is to prove the performance of ceremonies which indicate the severance of his natural family and his secular life. Proof of performance of 'Prajapathiyesthi' and 'Birajahoma' are considered very essential."

EVEN IN THE ABSENCE OF REGISTERED PARTNERSHIP PARTNERS RIGHTS

Ramesh Srinivasa Jannu vs. Srinivas Vittoba Jannu and Ors.:
2000(4)KCCR2609 MANU/KA /0742/2000 - Upon dissolution of partnership, the partners can acquire property in the moveable and/or immovable assets held by it even in the absence of a registered instrument vesting such property in their favour (Addanki Narayana v. Bhaskarappa Krishnappa, dead, by L.Rs. MANU/SC/0281/1966 : AIR 1966 SC 1300 and S.V.C. Pandian and Ors. v. S.V.S. Nadars and Ors. MANU/SC/0450/1993 : (1993) 1 SCC 589 (followed)).